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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ——

UNITED STATES, PETITIONER

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case, entered on October 14, 1966.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, pp. 13–25) is reported at 366 F. 2d 967.

JURISDICTION

The judgment of the Court of Claims was entered on October 14, 1966 (App, A, *infra*, pp. 13, 51–52). On January 13, 1967, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 13, 1967. We invoke the jurisdiction of this Court under 28 U.S.C. 1255(1).

STATUTES AND REGULATIONS INVOLVED

Sections 901 (a) and (b)(1) and 903 of the Internal Revenue Code of 1954, and Section 1.903–1 of the Treasury Regulations (1954 Code), are printed in App. B, *infra*, pp. 53–55.

QUESTION PRESENTED

The Internal Revenue Code of 1954 permits taxpayers to credit against their income tax any foreign income tax (§ 901(b)(1)) or "tax paid in lieu of a tax on income * * * otherwise generally imposed by" the foreign country (§ 903).[1] The question presented is whether taxes imposed by Canada and its provinces on the premiums received by life insurance companies are taxes "in lieu of" income taxes within the meaning of the latter provision.

STATEMENT

1. Respondent, a mutual life insurance company incorporated in New York State, conducted business in Canada and claimed credits against its federal income tax liability for taxes paid to the Dominion of Canada and the Province of Quebec in the years 1950 through 1955, and to the Province of Ontario in the years 1950, 1951, and 1952. The taxes in question were levied annually, at a rate of 2 percent, on the insurance premiums received from policyholders residing in the jurisdiction. Although the Dominion, Quebec and Ontario also levied income taxes, Equitable was

[1] The 1939 Code contains similar provisions (see § 131 (a) and (h)), which are applicable to some of the taxable years involved in this case.

exempt from them in respect of its life insurance business in Canada [2] (Fdgs. 2, 3, 7, 8–12, 15, 18, App. A, infra, pp. 26–29). The Court of Claims in this refund suit held that the premiums taxes were "in lieu of" the various Canadian income taxes within the meaning of Section 131(h) of the Internal Revenue Code of 1939 and Section 903 of the 1954 Code (App. B, *infra*, p. 54), and hence that Equitable was entitled to credit its premiums-tax payments against its federal income tax liability.

2. The tax systems of the three foreign jurisdictions may be briefly described as follows:

By the Excise Tax Act (II Revised Statutes of Canada (1952), c. 100) the Dominion imposes various excises, a manufacturers' sales tax, and other volume-of-business taxes. Section 4(1) of the Act imposed the 2 percent premiums tax involved in this case; by 1946 all insurance companies were taxed under this provision (Fdgs. 47–49, 51, 53, 59–60, App. A, *infra*, pp. 41–42, 43, 44, 46–48). The Dominion repealed the premiums tax as of 1957, whereupon the provinces—if they had not already done so—enacted the same tax (Fdgs. 66, 68, App. A, *infra*, pp. 49, 50). Section 30 of Part I of the Dominion's Income Tax Act (III Revised Statutes of 1952, c. 148) taxes life insurance companies on "the aggregate of the amounts credited to sharehold-

[2] In 1954 and 1955, Equitable paid a Dominion income tax under Part III of the Income Tax Act, III Revised Statutes of Canada, 1952, c. 148, §§ 106–110, which imposed a 15 percent tax on income received by nonresidents from Canadian investments (App. A, *infra*, p. 19, n. 1; Fdgs. 13, 15, 61, App. A, *infra*, pp. 28, 48).

ers' account or otherwise appropriated for or on account of shareholders during the year." Since foreign stock life insurance companies were by administrative ruling deemed not to have shareholders' accounts in Canada, and since mutual insurance companies have no shareholders, no such companies are subject to the tax. (Fdgs. 51–52, 64–65, App. A, *infra*, pp. 43–44, 49.)

As early as 1882, Quebec imposed annual taxes on major corporations, measured by paid-up capital and the number of places of business. Insurance companies paid those taxes until 1900, when a premiums tax was substituted. The tax rate for life insurance premiums was originally 1¾ percent; later it was raised to 2 percent. Quebec first imposed an income tax on corporations in 1932. It was in addition to the other taxes. After the Second World War and during the years involved in this case, Quebec imposed a 7 percent income tax on the net revenues of various corporations and businesses, which are also taxed by way of excises under other provisions of its Corporation Tax Act (Statutes of Quebec, 11 George VI (1947), c. 33). Insurance companies, among others, were not among the firms subject to the Act (see Section 6); they were therefore exempt from the income tax (Fdgs. 20–23, 67, App. A, *infra*, pp. 29–31, 49).[3]

[3] In 1957—after the taxable years at issue here—Quebec made its income-tax statute identical to the Dominion Income Tax Act so far as taxation of insurance companies was concerned (Fdg. 69, App. A, *infra*, p. 50).

In 1899, Ontario imposed an annual tax on various kinds of carriers, utilities, lending institutions, and insurance companies. The tax was generally measured by capital or equipment, but insurance companies were subject to a premiums tax instead, eventually at the rate of 2 percent for life insurance. The first income tax on corporations was enacted in 1932. During the years in issue here, Ontario, like Quebec, imposed a 7 percent income tax, pursuant to Section 14(1) of the Corporation Tax Act (Statutes of Ontario, 3 George VI (1939), c. 10: Revised Statutes of Ontario, 1950, c. 72), from which insurance companies, banks, railway companies, telephone companies and certain other companies were exempted (Fdgs. 24–27, App. A, *infra*, pp. 31–33).[4]

REASONS FOR GRANTING THE WRIT

1. The Court of Claims held in this case that Canadian taxes on the premiums of life insurance companies may be credited against federal income tax liability. Quite apart from the implications of this ruling for the general scope of the foreign tax credit (see below), it has a large direct impact upon the federal revenues. Existing claims of life insurance companies for income-tax refunds based on past payment of Canadian premiums taxes aggregate more than $42 million. And each year these companies will be entitled to claim, on the basis of such payment, a credit against their income tax liability (not merely

[4] Ontario, like Quebec, changed its income tax law in 1957 to make insurance companies subject to income taxes to the same extent as under Part I of the Dominion Income Tax Act (Fdg. 69, App. A, *infra*, p. 50).

a deduction from gross income) of some $5 million in the aggregate, if the ruling of the Court of Claims stands.

2. That ruling, we submit, rests on a misconception of the purpose and meaning of the "in lieu" provision of the foreign tax credit. This Court has never had occasion to construe that provision. We urge that it do so here in order to close a large loophole created by the ruling below.

a. Congress, in Section 131(h) of the Internal Revenue Code of 1939 (added by the Revenue Act of 1942, 56 Stat. 798) and Section 903 of the 1954 Code, did *not* provide that a company exempt from foreign income tax could credit any other tax it might happen to pay in the foreign jurisdiction. A tax, to be creditable, must be "in lieu of" an income tax "otherwise generally imposed." It must, in other words, be a specific substitute for a general income tax that would otherwise be applicable. The legislative history indicates that what Congress primarily had in mind were instances where administrative problems precluded taxing net income directly. Hearings on the Revenue Act of 1942 before the Senate Committee on Finance, 77th Cong., 2d Sess., pt. 1, pp. 207–208, 216–217; S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 131–132;[5] see, also,

[5] The representative of the National Foreign Trade Council—the moving force behind the "in lieu" provision—gave the following example (Hearings, *supra*, p. 207):

> You can imagine yourself in the position of the tax administrator in Cuba, for example, who has there in Habana the branch of an enterprise manufacturing various articles in the United States, and selling them in Cuba. The Cuban tax administrator can easily verify

Treas. Reg. § 1.903–1 (App. B, *infra*, pp. 54–55). Congress consistently rejected broader proposed measures both before enactment of the Revenue Act of 1942 and in the intervening period before reenactment of the "in lieu" provision in the 1954 Code. (See Hearings on the Revenue Revision of 1950 before the House Committee on Ways and Means, 81st Cong., 2d Sess., pt. 1, pp. 605–607; Hearings on the Revenue Revision of 1951 before the House Committee on Ways and Means, 82d Cong., 1st Sess., pt. 1, p. 250; H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 76–77, A250–A252; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 104–105.) And the term "in lieu of" is used throughout the Revenue Act of 1942 to indicate a substitution of one tax provision for another specific provision or tax that would otherwise be applicable. (See §§ 104, 105(b), 135, 136, 150(j), 165(c), 172, 185, 210(b), 213, 222, 303, 508).

It is thus plain that the only type of non-income tax embraced by the foreign tax credit is one specifically fashioned to take the place—to serve the function—of

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the gross income of that enterprise, but the Cuban tax administrator has no way of verifying the expenses, most of which are incurred in the United States and in transporting the goods to Cuba. So Cuba resorted to a very simple empirical method of taxation. It was first resorted to in connection with shipping enterprises. * * * They arbitrarily assumed that the expenses of the enterprise would be equal to about one-half of the gross income, but instead of reducing the gross income by one-half they simply cut the rate applicable to Cuban enterprises, namely, 6 percent to 3 percent, and provided in the income tax law that this rate be applied directly to the gross income of a foreign shipping company.

the general income tax. See *United States* v. *Waterman S. S. Corp.*, 330 F. 2d 128, 131 (C.A. 5), affirmed on another issue, 381 U.S. 252; *Commissioner* v. *American Metal Co.*, 221 F. 2d 134, 140 (C.A. 2), certiorari denied, 350 U.S. 829.

b. The Court of Claims impliedly rejected this fundamental precept in the instant case by viewing as irrelevant the persuasive indications that Canadian premiums taxes are not income tax substitutes. By focusing on the mere exemption from income tax, the court broadened the credit far beyond its intended scope.

(1) The premiums tax is an excise tax—a gross-receipts tax—and it is commonplace for firms to pay both excise and income taxes.[6] Excise taxes are typically in addition to, not in lieu of, income taxes. The Canadian premiums taxes, therefore, cannot realistically be presumed to be income tax substitutes without some clear indication that the legislature so intended. There was none here. Indeed, it is clear that

[6] Our Revenue Act of 1918, c. 18, 40 Stat. 1057, affords an illustration of the simultaneous imposition of income and premiums taxes on insurance companies. Except for certain small farmers' mutuals and the like (see 1918 Act, § 231(10), all insurance companies were then fully taxable on their underwriting income (profit from receipt of premiums in exchange for insurance) and investment income (profit from investing reserve funds held to meet policy obligations). 1918 Act §§ 230, 233. They were additionally subject to a 1 percent premiums tax or similar tax under Section 503 of the Act. Along with other corporations, moreover, insurance companies also paid a "special excise" on capital, surplus, and undivided profits. 1918 Act, § 1000 (a), (b), (c).

the provincial premiums taxes were, prior to the introduction of an income tax, substitutes for other *excise* taxes imposed generally on corporations, and they continue to be so.

(2) The Dominion imposes both premiums and income taxes on all domestic insurance companies save mutual insurance companies. Imposition of both taxes on the same companies is plainly inconsistent with the view that the premiums taxes are substitutes for income taxes. Were they such, it would be clearly inappropriate to subject the same company to both. We stress that foreign life insurance companies are exempt from Canadian income taxes for reasons unconnected with any notion that the premiums taxes they pay are in place of income taxes.

(3) The credit allowed under the Court of Claims' view thwarts the obvious purpose of the in-lieu provision of the foreign tax credit—equalizing the tax burdens of American businessmen within a foreign jurisdiction. Many American businesses in Canada pay both Canadian excise and Canadian income taxes. They cannot credit the excise taxes against their federal income tax liability. It is anomalous that a life insurance company should be able to do so because Canada exempted it from income taxes.

This last point is especially significant. One would expect a tax "in lieu" of an income tax to be a special levy to which only the exempt companies would be subject. But the premiums tax is a general tax imposed on insurance companies—those that pay, as well as those exempt from, income tax. It

is, in short, manifestly not an income tax substitute.

c. The Court of Claims' failure to weigh the foregoing points demonstrates, we submit, its tacit adoption of the view that all a taxpayer need show to credit a foreign excise tax is that he is exempt from the foreign jurisdiction's income tax. Indeed, solely on the basis of the provisions exempting insurance companies from various income taxes the court below concluded that the several legislatures had made "a deliberate choice between income and premiums taxes" which "is enough to characterize the premiums taxes as imposed 'in lieu of' income taxes." (App. A, *infra*, pp. 23–24.) We believe that this view is untenable and that it raises an issue warranting review by this Court.[7]

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[7] We point out that, unless review is granted by this Court, the ruling below will in all likelihood be final and conclusive on the question presented. No conflict among circuits is likely to develop, since any insurance company can bring a refund action in the Court of Claims, whose jurisdiction is nationwide. To be sure, an appeal raising a related question is now pending in the Ninth Circuit, *United States* v. *Occidental Life Insurance Co.*, No. 21039. However, that circuit has already held that Canadian premiums taxes are "in lieu of" income tax in the case of non-life mutual insurance companies. *Northwestern Mutual Fire Ass'n* v. *Commissioner*, 181 F. 2d 133.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1967.

APPENDIX A

In the United States Court of Claims

Nos. 559–58 through 563–58 and 253–60

(Decided October 14, 1966)

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. THE UNITED STATES

Daniel M. Gribbon, attorney of record, for plaintiff. *Robert E. O'Malley*, *Covington & Burling*; *Stuart McCarthy*, of counsel.

Martin B. Cowan, with whom was *Assistant Attorney General Mitchell Rogovin*, for defendant. *Lyle M. Turner* and *Philip R. Miller*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS and COLLINS, *Judges*.

OPINION

DURFEE, *Judge*, delivered the opinion of the court:*

In these six cases, plaintiff is suing for refunds of income taxes paid for the years 1950–1955. Each case covers a different year.

Each of the first five cases (Nos. 559–58 through 563–58, covering the years 1950–1954) originally involved a foreign tax credit issue (paragraph 5 of the respective petitions), a prepayment fees issue (paragraphs 6 and 7 of the respective petitions), a contributions issue (paragraph 8 of the respective petitions), a depreciation issue (paragraphs 9 and

*Most of the Findings of Fact were prepared by Trial Commissioner Mastin G. White. Although we agree with the Trial Commissioner that plaintiff should recover, we reach a different conclusion as to the effect of the historical evidence of the Canadian tax statutes in determining their legal purpose and intent.

11 of the respective petitions), and an adjustment for certain reserves issue (paragraph 10 of the respective petitions). The prepayment fees issue in the five cases was considered by the court on motions by plaintiff and by defendant for a partial summary judgment. The court's decision, rendered on March 2, 1960, was favorable to defendant, with the result that plaintiff's motion for a partial summary judgment was denied, defendant's motion was allowed, and paragraphs 6 and 7 of the respective petitions were dismissed (*The Equitable Life Assurance Society of the United States* v. *United States*, 149 Ct. Cl. 316, 181 F. Supp. 241, *cert. denied* 364 U.S. 829 (1960)). Subsequently, the contributions and depreciation issues in the five cases were settled administratively pursuant to an agreement of the parties, and a stipulation of dismissal with respect to paragraphs 8, 9 and 11 of the respective petitions was filed on May 27, 1964.

The developments previously mentioned have left for disposition by the court the foreign tax credit issue and the adjustment for certain reserves issue in the first five cases. The sixth case (No. 263–60), covering the year 1955, involves only the foreign tax credit issue.

A joint trial was held in October 1964 for the reception of evidence bearing on the issues that had not been disposed of theretofore.

Neither side presented any evidence at the trial relative to the adjustment for certain reserves issue. Since plaintiff, as the party seeking a tax refund, has the burden of proving its right to recover on this issue (*United States* v. *Anderson*, 269 U.S. 422, 443 (1926)), paragraph 10 of the respective petitions in cases Nos. 559–58 through 563–58 are hereby dismissed for lack of prosecution. Both sides presented evidence at the trial relative to the foreign tax credit issue now before us which is involved in all six cases.

This issue is whether taxes paid by an American mutual life insurance company during the years 1950 through 1955 to Canadian provinces and the Dominion of Canada, which are based upon a percentage of premiums collected within these tax jurisdictions, are taxes paid "in lieu of a tax upon income," under Section 131 of the Internal Revenue Code of 1939, as amended. This section provided in subsections (a)

and (h) that, in the case of a domestic corporation, its income tax "shall be credited with * * * the amount of any income * * * taxes paid or accrued during the taxable year to any foreign country," and that "the term 'income * * * taxes' shall include a tax paid in lieu of a tax upon income * * * otherwise generally imposed by any foreign country" (56 Stat. 856, 858). When the 1939 Code was superseded by the Internal Revenue Code of 1954, the provisions referred to in the preceding sentence were incorporated without substantial change in Sections 901 and 903 of the 1954 Code (68A Stat. 285, 287).

In the case of *Prudential Insurance Company of America* v. *United States*, 162 Ct. Cl. 55, 319 F. 2d 161 (1963), this court found that under the pertinent Canadian statutes, Prudential in 1949 was excused from paying the respective income taxes imposed by the Dominion of Canada, and by Ontario and Quebec on the net income or net revenue of corporations, but that Prudential was required to pay, and did pay to each of these jurisdictions a tax measured by a fixed percentage of total life insurance premiums received therein.

The court concluded that the taxes on insurance premiums which Prudential paid to the three Canadian jurisdictions came within the meaning of the phrase, "a tax paid in lieu of a tax upon income," as used in Section 131(h) of the 1939 Code, as amended, and that plaintiff was entitled to utilize the premiums taxes paid in Canada as a credit against its 1949 United States income tax.

Subsequently, in *Prudential Insurance Company of America* v. *United States*, 167 Ct. Cl. 598, 337 F. 2d 651 (1964), this court again considered the foreign tax credit issue with respect to premiums taxes of two percent which Prudential had paid to the Province of Ontario for the years 1950 and 1951, to the Province of Quebec for the period 1950–1956, and to the Dominion of Canada for the period 1950–1956. The foreign tax credit issue was presented to the court on motions by the parties for a partial summary judgment.

Subsections (a) and (h) of Section 131 of the 1939 Code, as amended, were superseded by Sections 901 and 903 of the 1954 Code for the latter part of the period involved in the second *Prudential* case, but, as indicated earlier in this opin-

ion, there actually was no change of substance in the pertinent provisions of United States law.

The court, in its second *Prudential* opinion, observed (pp. 600–601) that the Quebec statute involved in the second case was the same statute that had been involved in the first *Prudential* case; that although the Ontario statute involved in the first *Prudential* case had been replaced by a new statute in 1950, the provisions of the two statutes relevant to the issue before the court were almost identical; and that the Dominion statutes applicable to the first *Prudential* case were either identical with, or very similar to, the Dominion statutes pertinent to the second *Prudential* case. Defendant had also argued that no mutual insurance company was regarded in Canada as a profit-making concern and subject to income tax. The court decided that American mutual life insurance companies were regarded as taxable profit-making concerns under Canadian law.

The court concluded that the decision in the first *Prudential* case should govern the disposition of the second case under the rule of *stare decisis*. Accordingly, the court granted plaintiff's motion for a partial summary judgment on the foreign tax credit issue, and denied defendant's cross-motion.

The present litigation involves claims by another American insurance company, The Equitable Life Assurance Society of the United States, for income tax refunds on the basis of premiums taxes which plaintiff paid at the rate of two percent to the Province of Ontario for the period 1950–1952, to the Province of Quebec for the period 1950–1955, and to the Dominion of Canada for the period 1950–1955. Thus, the present litigation involves the same years, 1950–1955, that were involved in the second *Prudential* decision, except that the latter also covered the year 1956 in addition to the period 1950–1955; and it also involves a mutual life insurance company.

Although the relevant facts and statutes now before us are identical or closely similar to those in the two previous *Prudential* decisions, the Government now urges that the history of premiums taxes and income taxes in Canada should cause us to reverse our former position. Defendant has presented a long and exhaustive analysis of this tax

history, purporting to show that as a matter of historical fact, plaintiff and other American insurance companies doing business in Canada were not exempted from the payment of Canadian income taxes because they paid premiums taxes there, and conversely, that the imposition of Canadian premiums taxes on plaintiff and other similar American insurance companies was not due to the circumstance that they were exempted from the payment of Canadian income taxes.

The Government again urges, as it did in the earlier *Prudential* cases, that historical analysis of the tax statutes demonstrates that Canadian premiums taxes did not come within our statutory category of "a tax paid in lieu of a tax upon income." This historical tax record was as readily available to the Government in its defense of the two previous *Prudential* cases as it is now in the present case. Much of this same record was presented by defendant in these two prior cases, and considered by the court. As we said in the second *Prudential* case (at p. 604):

> * * * we are persuaded *by the history* and terms of the various Canadian taxing acts that these premiums taxes were paid "in lieu of" income taxes imposed on others. [Emphasis supplied.]

Certainly, the essential element of legal continuity applicable to these three identical cases would justify us to again invoke the rule of *stare decisis*.

There is nothing before us to cause the court to now view either of the prior *Prudential* decisions as being in error; in fact, the Government never sought reconsideration or review of either decision. It is now rather late in the game for defendant to ask the court to reconsider the same issue, but in view of numerous important cases pending before the court involving the same point, public policy in this instance warrants a full review of the more extensive record of the legislative history of the Canadian tax statutes now before us.

As we said in the second *Prudential* case before deciding that the case was governed by the rule of *stare decisis* established in the first case:

> * * * If such a comparison shows the statutes to be identical or substantially the same, and if defendant has shown no changes in related factors or circumstances we must, under the well established rule of *stare decisis*,

> grant plaintiff's motion. If, on the other hand, the statutes are not the same, or if defendant has effectively shown the existence of certain related factors not known at the time of the previous case, then such nuances and/or new evidence must be evaluated before final disposition of these motions. (at p. 601)

The record of legislative history and origins of the taxes in question establishes that provincial premiums taxes were imposed in Canada upon mutual life insurance companies long before the enactment of provincial corporate income tax statutes, and the Dominion did not impose premiums taxes upon such companies until years after it adopted an income tax of general application. The Province of Quebec imposed premiums taxes in 1875, but did not enact a general income tax until 1932. Ontario's first premiums tax was enacted in 1889; its first general income tax statute came in 1932. With some variations as to timing and language, the relevant tax history of the other Canadian provinces followed this same pattern. By 1941 all of the provinces had in effect both a premiums tax applicable to insurance companies, and a general income tax, generally with an express provision that insurance companies paying the premiums taxes were not liable for payment of the general corporate income tax. In Alberta insurance companies were permitted a credit against their income tax liabilities for the amount of premiums taxes paid by them. In British Columbia, the Income Tax Act imposed a premiums tax on life insurance companies "in lieu of all tax otherwise imposed by this Act."

Prior to 1941, the Dominion of Canada never imposed any premiums or income taxes on mutual life insurance companies, although a general tax on incomes was in effect since 1917. In 1942 all of the provinces repealed or suspended the operation of most provincial taxes, including premiums taxes, corporation income taxes and other forms of corporate taxation under their "Wartime Tax Agreements" with the Dominion, effective for the year 1941. These agreements remained in effect until 1947, and were then extended pursuant to "Tax Rental Agreements" through 1951, except as to Ontario and Quebec. A new series of "Tax Rental Agreements" extended this arrangement through 1956 except as to Quebec. During this 16-year period from 1941 through

1956, the Dominion did not impose any net income taxes on mutual life insurance companies, but did impose premiums taxes at rates approximating the prior provincial rates. During the years at issue in this case, the Dominion did impose a corporate income tax of general application, from which a mutual life insurance company was completely exempt, and plaintiff was not assessed or required to pay any corporate income taxes under Part I of the Dominion Income Tax Act. The Dominion statutes involved are the same, or almost identical with those involved in the two *Prudential* cases, *supra*.[1]

In 1956, pursuant to the Federal-Provincial Tax Sharing Arrangements Act, the Dominion repealed its premiums tax provision, effective for 1957 and subsequent years, in order that the provincial governments could again impose their own premiums tax.

During the years at issue in this case, 1950 through 1956, plaintiff has paid premiums taxes to the Provinces of Ontario, Quebec, and to the Dominion, and has never been assessed or required to pay, and has never paid, any corporate income taxes in any of these three tax jurisdictions.

Although nearly all of the historical record of the origin of the identical tax statutes has already been reviewed by the court in the two *Prudential* cases, *supra*, we have made new findings based on the more extensive historical record in the present case.

The historical development in the provinces clearly demonstrates that, by 1944, premiums taxes were consistently imposed upon mutual life insurance companies, whereas general income taxes were never imposed thereon, and that in 1942 the Dominion adopted this same choice of tax method. This is not a novel concept. Most of our own states follow a similar system as to mutual life insurance companies, a premiums tax is accepted in lieu of income taxes, even though the imposition of the premiums taxes predated the income

[1] The only taxes paid by Equitable to the Dominion under the Income Tax Act during the years 1950 through 1955 were those taxes paid by it during the years 1954 and 1955 pursuant to Part III of the Income Tax Act. Part III imposes a tax at a flat rate—normally 15%—on the investment income of nonresidents. Equitable, as a foreign insurance company, was required under the Canadian insurance laws to maintain assets in Canada equal to its Canadian liabilities and it was required to pay the Part III tax only on its income from Canadian investments in excess of 110% of such required reserves.

taxes. For example, in the District of Columbia itself, sections 47–1554(g) and 47–1806 (1961 ed.) of the District of Columbia Code specifically provides that the premiums tax shall be in lieu of income and most other taxes.

What defendant in essence argues is that because enactment of the premiums taxes came first, and only provided an excise tax for doing business, this has no connection with the later enactment of incomes taxes; therefore it cannot be "in lieu of" income taxes. Originally, this may have been correct. However, the circumstances under which one tax originates are not necessarily determinative of its relationship to another tax which originates at a later date. Constant and current review of fiscal and economic conditions is essential to tax legislation in the light of potential sources of Governmental revenue and changing needs for revenue. The most relevant legislative history before us now is not found in the earlier origins of these two methods of taxation in Canada, but it began when a cognizant and deliberate choice was first made by the Canadian legislatures between the application of premiums taxes or income taxes for mutual life insurance companies. This choice was first made by the Canadian provinces at various times generally in the 1930's, as they recognized the income tax as an increasingly effective and necessary method of raising revenue.

The court has already analyzed the basis upon which that choice was made, and thereafter affirmed in Quebec and Ontario in the two *Prudential* cases, *supra*, which was typical of the actions taken by the provincial legislatures. In the first *Prudential* case, the court said (at pp. 60–61):

> The Ontario premiums tax for 1949 was imposed by section 4 of The Corporations Tax Act of Ontario (3 Geo. VI (1939), c. 10, as amended). That section declared in subsection (1) that "Every insurance company shall pay a tax in respect to life insurance premiums of two per centum calculated upon the gross premiums received during the fiscal year from policyholders resident in Ontario," excluding premiums returned and certain other items. The same statute provided in subsection (1) of section 14 that "* * * every incorporated company * * * which transacts business in Ontario, shall for every fiscal year of such company pay a tax of seven per centum calculated upon the net income

of the incorporated company;" but subsection (3) (h) of section 14 expressly provided that "Any incorporated company paying taxes under this Act as * * * [an] insurance company" should not be subject to the tax imposed by section 14. Therefore, plaintiff was excused from paying the Ontario tax calculated on the net income of corporations because it was an insurance company paying a premiums tax under another section of the same statute. It seems obvious that if the Ontario premiums tax was not an "income" tax, it was certainly a tax paid "in lieu of" income tax and, therefore, that it clearly came within the scope of subsection (h) of section 131 of the Internal Revenue Code of 1939, as amended.

This conclusion by the court is further fortified by the fact that when the Ontario legislature was considering the enactment of the 1939 Corporations Tax Act, the bill which ultimately became law was accompanied by the following "Explanatory Note" regarding subsection 3 of section 14 of the Act:

> "Subsection 3. This subsection groups all classes of companies which are exempt from tax calculated on net income and corresponds to subsections 5 and 6 of section 4 of the present Act. The exemptions are as nearly as possible those provided in the Dominion Income Tax Act. Banks, *Insurance Companies*, Railway Companies, Telegraph Companies, Telephone Companies, Express Companies and Companies operating sleeping, parlour or dining cars on railways *are specially taxed under earlier provisions of this Act and are therefore exempt from the tax, calculated on net income imposed herein*, * * *" (App. B, p. 19 of Bill No. 54; App. C, p. 19 of Bill No. 54). [Emphasis added.]

Again, in the first *Prudential* decision, *supra*, we said as to Quebec:

> The premiums tax which plaintiff paid to the Province of Quebec for 1949 was imposed by subdivision 3 of section 3 of the Quebec Corporation Tax Act (11 Geo. VI (1947), c. 33). This subdivision imposed on "every insurance company, a tax of two per centum on every premium received by the company * * * in respect of the business transacted in Quebec." Other subdivisions of section 3 (it contained a total of 19 subdivisions) imposed taxes of various kinds on other types of companies, such as banks, loan companies, navigation companies,

etc. Then section 6 of the same statute provided that "every company * * * contemplated by subdivisions 1, 4, 5, 6, 7, 8, 11, 13, 14, 15, 16, 17, 18 and 19 of section 3 * * * shall pay annually a tax equivalent to seven per centum of the net revenue of their respective financial year * * *." The failure of section 6 in the portion just quoted to refer to subdivision 3 of section 3, covering insurance companies, had the effect of excusing insurance companies from the payment of the 7 percent tax on net revenue imposed by section 6. (At p. 61.)

Plaintiff in the present case was "otherwise specially taxed" as an insurance company in Quebec under subdivision 3 of section 3, and was not required to pay, and in fact did not pay, any income taxes under section 6 of the Quebec statute during the years 1950 through 1955.

In the first *Prudential* case, *supra*, the court also dealt with premiums taxes paid to the Dominion of Canada in 1949. (There is no significant difference between the relevant tax statutes at that time and during 1950 through 1955.)

At pp. 61, 62 and 63:

> The premiums tax which plaintiff paid to the Dominion of Canada in 1949 was payable under the Dominion's Excise Tax Act (Re. Stat. of Can. 1927), c. 179, as amended). That act provided in section 14(1) that "Every company authorized under the laws of the Dominion of Canada or of any province thereof to transact the business of insurance * * * shall pay to the Minister a tax of two per centum upon the net premiums received by it in Canada less net premiums paid for reinsurance to companies or associations to which this section applies * * *." The term "net premiums" was defined to mean "in the case of a company transacting life insurance, the gross premiums received by the company other than the consideration received for annuities, less premiums returned and less the cash value of the dividends paid or credited to policyholders." However, an insurance company was permitted to deduct the amounts of any premiums taxes paid to any Provinces of Canada, and in 1949 only the Provinces of Ontario and Quebec were imposing such taxes. Another statute of the Dominion of Canada, The Income Tax Act (11-12, Geo. VI (1948), c. 52, as amended), imposed in section 36 a tax on the net income of corporations, the rate on the taxable income, or on the taxable income earned in Canada, being 10 percent of the first $10,000 and 33 percent of amounts over $10,000. However, it was provided in section 29 of The

Income Tax Act that the taxable income of a life insurance corporation should be "the aggregate of the amounts credited to shareholders' account or otherwise appropriated for on account of shareholders during the year," less certain specified amounts. As plaintiff is a mutual insurance company, it does not have any shareholders; and accordingly, it was excused by section 29 of The Income Tax Act of Canada from paying the income tax imposed on corporations by that act.

Thus, it will be seen that plaintiff in 1949 was excused from paying the respective income taxes imposed by the Provinces of Ontario and Quebec and by the Dominion of Canada on the net income or net revenue of corporations, but that plaintiff was required to pay, and did pay, to each of these jurisdictions a tax measured in terms of its gross income or gross sales, i.e., on premiums received.

We conclude that the tax on insurance premiums which plaintiff paid within the three Canadian tax jurisdictions involved was "a tax paid in lieu of a tax upon income * * * otherwise generally imposed" within these three foreign tax jurisdictions, within the meaning of sec. 131(h) of the Internal Revenue Code. * * *

The Dominion Parliament first exempted life insurance companies from income tax because of public policy which recognized the social utility of life insurance and that policyholders should not be made to bear the burden of income or profits taxes, by means of increased premiums, decreased dividends or otherwise. This was the legislative intent in 1916 when the Dominion enacted an excess profits tax, the first tax on income or profits imposed by the Dominion. The general tax on net incomes was first levied in 1917, and mutual insurance companies were not liable. These same considerations of public policy would appear to account for the fact that life insurance companies were not subject to Dominion premiums taxes until 1941. However, this 1916–1917 concept of public policy does not explain why the Dominion in 1941 first chose to impose premiums taxes on life insurance companies, and to exempt them from income taxes. Clearly, this prior concept of public policy was changed by the Canadian Parliament in 1941 to require that mutual life insurance companies pay substantial taxes in support of Dominion governmental activities. To effectuate this obvious purpose, the Dominion chose to impose the pre-

miums tax and not the existing general corporate income tax from a source hitherto exempt from Dominion taxes. In so doing, the Dominion was making the same deliberate selection between a special method of raising revenue and a general method that had been already made by the provincial governments as to mutual life insurance companies. In other words, both the Dominion and the provinces decided to impose or retain the premiums taxes because these insurance companies were not being asked to pay income taxes, and it was thought that adequate taxes should be paid by these companies as well as by the other businesses which were subject to the income tax. For the purposes of the Internal Revenue Code's foreign tax credit, that is enough to characterize the premiums taxes as imposed "in lieu of" income taxes.

Defendant has again asserted its argument that premiums taxes may not be credited against taxpayers' United States income taxes because they were imposed on or with respect to underwriting receipts on life insurance not taxed in the United States. As we noted in the first *Prudential* opinion, this distinction was eliminated by the amendment of section 131(a) of the 1939 Code to allow as a foreign tax credit a tax paid "in lieu of a tax upon income," which contemplated a tax measure by gross income or gross sales which are clearly analogous to life insurance premiums. The income of life insurance companies has not been taxed under the *general* provisions of the Internal Revenue Code, but by various formulae in lieu of the general income tax, generally by the application of a selected rate to investment income. Sec. 901 to 905, Internal Revenue Code, 1954.

In neither the United States nor Canada has there been a general tax on income of mutual life insurance companies as was generally applied to other corporations. Canada chose a premiums tax rather than the special formula income tax chosen by the United States to apply to life insurance companies. Sec. 201(b) *et seq.* 1939 and Sec. 801 *et seq.* 1954 Internal Revenue Code. This difference in tax methods or formulae between the tax jurisdictions gave rise to precisely the situation envisioned in the enactment of section 131(a) of the 1939 Code by which the foreign tax "in lieu of" in-

come taxes can be credited on the Federal income tax. The tax formula stated in section 131(a) (sec. 904, 1954 Code), specifically limits the amount of the foreign tax credit; this eliminates the possibility of any windfall to a taxpayer such as defendant contemplates.

Plaintiff has paid both Canadian and United States taxes on its insurance business in Canada. If the foreign tax credit is not allowed for premiums taxes paid in Canada in lieu of income taxes, its Canadian insurance business would be burdened by the double taxation of both the Canadian premiums tax and the full United States tax on income attributable to its Canadian business without any credit for taxes paid in Canada. The foreign tax credit provisions of section 131 of the 1939 Code were expressly enacted to eliminate this possibility.

Section 903 of the regulations under the Internal Revenue Code of 1954, which is virtually identical to the regulations issued under Section 131(h) of the 1939 Code, states that a tax imposed by a foreign country is deemed to be imposed "in lieu of" an income tax under Section 131(h) of the Code if:

> (1) Such country or possession has in force a general income tax law,
>
> (2) The taxpayer claiming the credit would, in the absence of a specific provision applicable to such taxpayer, be subject to such general income tax, and
>
> (3) Such general income tax is not imposed upon the taxpayer thus subject to such substituted tax.

In the present case, we conclude that the premiums taxes paid by Equitable for the years involved in each of the Canadian jurisdictions included in this case met all three of these requirements, and that said payments were "in lieu of" income taxes imposed by each of these foreign tax jurisdictions, and accordingly entitled to allowance of credit under the provisions of sec. 131 of the 1939 Code and section 901(a) of the 1954 Internal Revenue Code.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Mastin G. White, and the briefs and argument of counsel, makes findings of fact as follows:

Findings of Fact

General

1. This court has jurisdiction of these cases pursuant to Section 1491 of Title 28, United States Code.

2. The Equitable Life Assurance Society of the United States (which, for the sake of convenience, will usually be referred to hereafter in the findings as "the plaintiff") is, and at all times relevant to these cases has been, a mutual life insurance company incorporated under the laws of the State of New York. Its principal place of business is now located at 1285 Avenue of the Americas, New York, New York, 10019.

3. During all the tax years involved in these cases (1950–1955), the plaintiff was a life insurance company within the meaning of Section 201(b) of the Internal Revenue Code of 1939 and Section 801 of the Internal Revenue Code of 1954.

4. During the years 1950 through 1955, the plaintiff was a mutual life insurance company, having no shareholders or shareholders' accounts. It did not, in any of these years, credit any amounts of money to shareholders' accounts, nor did it otherwise appropriate any amounts of money for or on account of shareholders.

5. During the years 1950–1955, the plaintiff maintained its books of account and computed its United States income tax liability on the cash receipts and disbursements method of accounting.

6. The amount of insurance premiums taxes paid by the plaintiff to the Provinces of Ontario and Quebec and to the Dominion of Canada during the years of 1950–1955, as shown in subsequent findings, represented in each instance a payment of premiums taxes on account of premiums collected in the preceding calendar year.

7. During the years 1950 through 1955, the plaintiff was registered to do business in the Dominion of Canada and was licensed to do business in the following provinces of Canada: British Columbia, Newfoundland, Nova Scotia, Ontario, Quebec, and New Brunswick. The plaintiff, in connection with its registration and licenses in the Dominion and in the provinces, paid certain fees and assessments im-

posed by the licensing statutes of the Dominion and the provinces.

8. During the calendar years 1950, 1951, and 1952, the plaintiff paid $18,845.17 (United States dollars) in insurance premiums taxes to the Province of Ontario on account of premiums collected from policyholders resident in Ontario, pursuant to The Corporations Tax Act, Statutes of Ontario, 3 Geo. VI (1939), ch 10, § 4(1), as amended, effective during the calendar year 1949, and The Corporations Tax Act, Rev. Stat. of Ontario, 1950, ch. 72, § 4(1), as amended, effective during the calendar years 1950 and 1951, as follows:

1950	$4,261.70
1951	$8,520.41
1952	$6,063.06

9. During the calendar years 1950 through 1955, the plaintiff paid $23,580.93 (United States dollars) in insurance premiums taxes to the Province of Quebec on account of premiums collected from policyholders resident in Quebec, pursuant to the Corporation Tax Act, Statutes of Quebec, 11 Geo. VI (1947) ch. 33, § 3(3), as follows:

1950	$2,015.15
1951	$2,372.16
1952	$2,881.55
1953	$3,423.55
1954	$4,130.33
1955	$8,758.19

10. Except for the insurance premiums taxes paid to the Provinces of Ontario and Quebec, the plaintiff was not required to pay, and in fact did not pay, any other taxes imposed by The Corporations Tax Act of Ontario, *supra*, or the Corporation Tax Act of Quebec, *supra*.

11. During the calendar years 1950 through 1955, the plaintiff paid $69,732.76 (United States dollars) in insurance premiums taxes to the Dominion of Canada on account of premiums collected from policyholders resident in all provinces except Quebec and Ontario (prior to 1953), pursuant to the Dominion Excise Tax Act (Rev. Stat. of Canada, 1927, ch. 179, § 14(1), as amended, effective for the years 1949 through 1952, and Rev. Stat. of Canada, 1952, ch. 100, § 4(1), as amended, effective for the years 1953 through 1955), as follows:

1950	$1,566.92
1951	$1,757.99
1952	$3,095.70
1953	$17,284.56
1954	$18,734.80
1955	$27,292.79

12. The plaintiff was not required to pay, and in fact did not pay, to the Dominion of Canada any income taxes imposed by Part I of The Income Tax Act (Statutes of Canada, 11–12 George VI (1948) ch. 52, §§ 1–95, as amended), effective for the years 1949 through 1952, and Part I of the Income Tax Act (III Revised Statutes of Canada, 1952, ch. 148, §§ 1–104, as amended) effective for the years 1953 through 1955.

13. During 1954 and 1955, the plaintiff paid to the Dominion of Canada the following amounts pursuant to Part III of the Income Tax Act, *supra*, Secs. 106–110:

1954	$4,638.82
1955	$8,418.20

The taxpayer has claimed, and has been allowed, a credit against its United States income taxes for the amount of these taxes.

14. For the years 1950 through 1952, the plaintiff timely filed its Federal income tax returns with, and paid the taxes shown as due thereon to, the Collector of Internal Revenue for the Second District of New York. For the years 1953 through 1955, the returns were timely filed with, and the taxes were paid to, the District Director of Internal Revenue for the Lower Manhattan District of New York.

15. The plaintiff filed timely claims for refund of taxes with respect to all the years involved in these cases. The refund claims for the years 1950 through 1954 were denied by the Internal Revenue Service on October 7, 1958, and the refund claim for 1955 was denied on July 18, 1958. The plaintiff thereupon filed in this court timely suits for refund of the taxes for all six years, 1950 through 1955. All but two of the issues raised in the suits have been decided on motions for partial summary judgment (149 Ct. Cl. 316, 181 F. Supp. 241, *cert. denied* 364 U.S. 829) or settled, and the taxpayer has prosecuted only one of the remaining two issues.

16. The plaintiff is, and always has been, the sole and abso-

lute owner of the claims presented in these cases, and has made no transfer of the claims or any part thereof.

17. Except as stated in these findings, no action has been taken on the claims that are involved in the present cases by the Congress, by any department of the United States Government, or in any judicial proceeding.

18. The parties have agreed that, in the event the court holds plaintiff is entitled to a credit against its United States income taxes for the amount of insurance premiums taxes paid by the plaintiff to the Dominion of Canada and the Provinces of Ontario and Quebec, the plaintiff shall be entitled without further proceedings to recover the following amounts, together with interest as provided by law, with respect to the Dominion and the Provinces of Ontario and Quebec:

Year	Dominion	Ontario	Quebec
1950	$1,566.92	$4,261.70	$2,015.15
1951	1,757.99	8,520.41	2,372.16
1952	3,095.70	6,063.06	2,881.55
1953	17,284.56		3,423.55
1954	18,734.80		4,130.33
1955	27,292.79		8,758.19

History of Premiums and Income Taxes in Quebec Prior to 1941

19. The first attempt in Canada to tax insurance companies occurred in 1875, when Quebec enacted a 3-percent tax on fire insurance premiums and a 1-percent tax on other insurance premiums. This statute was tested in the courts, and it was held to be invalid in the case of *The Attorney General for Quebec* v. *The Queen Insurance Co.*, 3 App. Cas. 1090 (Privy Council, 1878), on the ground that it imposed an indirect tax and, therefore, was beyond the power of the provincial government.

20. In 1882, Quebec imposed on various kinds of major corporations, such as common carriers, utilities, banks, and insurance companies (other than mutual insurance companies organized under the laws of Quebec), an annual tax payable to the license inspector. This tax, generally, was measured

by the paid-up capital and the number of places of business maintained by each taxpayer. Insurance companies, in addition to paying the capital and place-of-business taxes that were imposed by the statute on all corporations within its purview, also paid a fixed annual tax of $500 if carrying on solely the business of life insurance or $400 if carrying on any other kind of insurance business, and if a company combined two or more kinds of insurance (including life insurance), it was required to pay $400 plus an additional sum of $50 for each kind of insurance carried on beyond one. These taxes were held constitutionally valid in *Bank of Toronto* v. *Lambe* (together with *North British Mercantile Insurance Co.* v. *Lambe*), 12 App. Cas. 575 (Privy Council, 1887).

21. In 1900, the taxes imposed by Quebec on insurance companies were replaced by a tax of 1 percent on life insurance premiums and a tax of two-thirds of 1 percent on other kinds of insurance premiums. In no event could the annual tax be less than $250. In 1906, this rate was raised to 1¾ percent for life insurance premiums and 1 percent for other insurance premiums. In 1939, the rate on premiums for non-life insurance became 2 percent. Except for certain minor changes in the minimum amount of taxes payable (becoming $500 for life insurance companies by 1939), there were no other changes in the tax rates between 1900 and 1941. During the entire period from 1906 to 1941, payment of the minimum tax was expressly required of any insurance company as a condition precedent to its "beginning to transact business" in Quebec.

22. In Quebec, income taxes were first generally imposed on all corporations in 1932. The income tax rate was 1.5 percent. No change was made at that time in the previously imposed premiums or other tax rates, and insurance corporations and others paying the special taxes on capital and related items were not expressly excluded from the income tax. Nevertheless, mutual insurance companies did not pay the income tax. In 1939, the income tax statute was amended so that it clearly did not apply to most corporations paying the other corporate taxes. In 1939, also, the income tax rate was increased to 2.5 percent, and the rate of the tax on non-life insurance premiums became 2 percent, but no change was made in the 1¾ percent tax rate on life insurance premiums.

Effective April 1, 1940, the income tax rate was increased to 5 percent, but no change was made in the premiums tax rates.

23. Pursuant to section 6 of the Corporation Tax Act, Statutes of Quebec, 11 Geo. VI (1947), ch. 33, effective during all of the taxable years at issue, the province of Quebec imposed a seven percent "net revenue" tax of general application. Section 6 provided that this tax was to be imposed on "every company, partnership or person contemplated by subdivisions 1, 4, 5, 6, 7, 8, 11, 13, 14, 15, 16, 17, 18 and 19 of section 3 * * *." Subdivision 1 of section 3 of the Act applied to "* * * every incorporated company carrying on any undertaking, trade or business which is not otherwise specially taxed under the following subdivisions of this section 3." Plaintiff was "otherwise specially taxed" as an insurance company under subdivision 3 of section 3 and was not required to pay, and in fact did not pay, any income taxes under section 6 of the Quebec statute during the years 1950 through 1955.

History of Premiums and Income Taxes in Ontario Prior to 1941

24. Ontario first imposed a general annual tax on various kinds of carriers, utilities, lending institutions, and insurance companies in 1899. In most cases, the tax was measured by capital or equipment (e.g., miles of track in the case of railways), but in the case of insurance companies the tax was 1 percent on life insurance premiums and two-thirds of 1 percent on other premiums. Originally, the premiums tax could be credited by the amount of the license fees paid to Ontario, and the statute imposing the premiums tax expressly prohibited the imposition of any municipal license or privilege taxes for the right to do an insurance business in Ontario.

25. The premiums tax in Ontario was increased to 1¾ percent on life insurance premiums and 1 percent on other insurance premiums in 1914. Between 1915 and 1920, there was no premiums tax in Ontario, and all insurance companies paid a fixed tax of $30,000. In 1920, the premiums tax was reimposed at a rate of 1¼ percent on life insurance and at a rate of 1 percent on other insurance. These rates were in-

creased in 1932 to 1¾ percent on life insurance, 1⅔ percent on fire insurance, and 2 percent on other insurance. The several rates were further increased by 25 percent effective in 1939.

26. In Ontario, income taxes were first imposed on corporations generally in 1932. The tax was not imposed on most companies already taxed on their capital, equipment, and other property and on their places of business, and no change was made in the rate of tax on insurance premiums. In 1935, all mutual companies, including mutual insurance companies, were expressly exempted as a class from the income tax. The income tax rate in 1932 was 1 percent, but this was increased to 2 percent in 1939 and to 5 percent effective in 1940. Premiums taxes were not increased or otherwise changed in 1935 or 1940.

27. Pursuant to section 14(1) of The Corporations Tax Act, Statutes of Ontario, 3 Geo. VI (1939), ch. 10, as amended, effective during the calendar year 1949, and section 14(1) of The Corporations Tax Act, Rev. Stat. of Ontario, 1950, ch. 72, as amended, effective during the calendar years 1950 and 1951, the province of Ontario imposed a seven percent net income tax of general application. Subsection (3)(h) of section 14 of the 1939 Ontario statute provided that:

> (3) The following incorporated companies shall not be liable to the [seven percent net income] tax imposed by this section:
>
> (h) Any incorporated company paying taxes under this Act as a[n] * * * insurance company * * *;

Subsection (3)(i) of section 14 of the 1950 Ontario statute, effective during the years 1950 and 1951, contained virtually identical provisions. Plaintiff was not required to pay, and in fact did not pay, any income taxes under section 14 of either the 1939 or 1950 Ontario statutes.

When the Ontario Legislature was considering the enactment of the 1939 Corporations Tax Act, the Bill which ultimately became law was accompanied by the following "Explanatory Note" regarding subsection 3 of section 14 of the Act:

Subsection 3. This subsection groups all classes of companies which are exempt from tax calculated on net income and corresponds to subsections 5 and 6 of section 4 of the present Act. The exemptions are as nearly as possible those provided in the Dominion Income Tax Act. Banks, *Insurance Companies*, Railway Companies, Telegraph Companies, Telephone Companies, Express Companies and Companies operating sleeping, parlour or dining cars on railways *are specially taxed under earlier provisions of this Act and are therefore exempt from the tax, calculated on net income imposed herein*, although such companies are not so exempt under the Dominion Income Tax Act. (App. B, p. 19 of Bill No. 54; App. C, p. 19 of Bill No. 54). [Emphasis added.]

History of Premiums and Income Taxes in Other Provinces and Newfoundland Prior to 1941

28. In 1907, Alberta imposed a 1 percent premiums tax on insurance companies, as well as place-of-business, paid-up capital, and related taxes on various carriers, utilities, and lending institutions. Ever since 1907, the license to do an insurance business in Alberta has been expressly contingent upon filing a proper return for the premiums tax, and no municipality could impose on any company paying the premiums tax a license fee or tax on the privilege of doing business. In 1916, the capital taxes (at a rate of 0.02 percent) were extended to all corporations not already taxed under one of the other divisions of The Corporations Taxation Act. In 1922, the tax on life and fire insurance premiums and the capital taxes were doubled. In 1931, the rate of tax on life insurance premiums was left at 2 percent, but the rate of tax on hail insurance premiums was lowered to 0.5 percent and the rate on other insurance premiums was lowered to 1 percent. In 1938, the rates on life insurance and fire insurance premiums were increased to 3 percent and 2 percent, respectively, and the capital tax increased by 25 percent (to a total of 0.05 percent).

29. A tax on insurance premiums was imposed by British Columbia in 1901. The rate at first was graduated, but in 1903 the rate became a flat 1 percent. Only the premiums tax or the then generally imposed personal property tax, whichever was greater, had to be paid.

30. Commencing in 1912, The British Columbia Fire Insurance Act imposed a 2 percent tax on fire insurance premiums, and fire insurance companies did not have to pay any tax under the Assessment Act, nor could any municipality impose any license fee. The rate of tax on all insurance premiums was increased to 2 percent in 1918, and to 2¼ percent in 1931, and, in the case of life insurance premiums, the tax rate was further increased to 2¾ percent in 1938. There were no other changes through 1941. In 1922, insurance companies were allowed to credit their license fees (up to $100) against the premiums tax; and since 1922, the relevant taxing statutes have expressly stated that the premiums tax was in lieu of both the income and the personal property taxes otherwise imposed by British Columbia.

31. Manitoba's first Corporations Taxation Act was enacted in 1900, and it imposed annual taxes of various kinds on carriers, utilities, lending institutions, and insurance companies. One of the penalties for failure to file a correct tax return was forfeiture of the right to do business. The tax on insurance companies was 1 percent of premiums, and the license fees paid under the insurance statute could be credited against the premiums tax. In 1919, the premiums tax was increased to 2 percent, and in 1932 it was increased to 3 percent.

32. In 1892, New Brunswick imposed its first general corporate tax. Fire insurance companies were required to pay 1 percent of premiums (plus, if their principal offices were not within the province, an additional $100), life insurance companies were required to pay $100 or $250 (depending on whether the principal office was within the province), and accident and guarantee insurers had to pay $25 plus 0.5 percent of their premiums. Taxes were also imposed on various carriers, utilities, and lending institutions, either at flat rates or measured by equipment or capital. The taxing statute was part of the statute dealing with the licensing of foreign corporations to do business in the province. In 1920, the premiums tax rate was increased to 2 percent on fire and other non-life insurance premiums (subject to certain minimum amounts), and a 1.5 percent tax was imposed on life insurance premiums (plus an additional tax of $100 on life insurance companies). Other corporation taxes were also

increased in 1920. In 1938, the tax rate on life insurance companies became $150 plus 2.5 percent of premiums, and the rate on other insurance companies became 3 percent of premiums (with minimums ranging from $25 to $150). Insurance companies did not have to pay the capital taxes generally imposed on corporations.

33. In 1912, Nova Scotia imposed annual taxes on various lending and financial institutions, utilities, and carriers, measured by capital, equipment, places of business, or other property. No taxes were imposed on income or profits, but insurance companies paid a tax of 1 percent on their gross premiums. These taxes were in lieu of annual registration fees imposed by earlier statutes. In 1913, a minimum tax of $50 was imposed on insurance companies. In 1914, the rate on life insurance premiums was increased to 1.25 percent, and it was increased to 1.75 percent in 1918. As of June 1, 1919, all premiums became taxable at 1.75 percent. A year later, the rate rose to 2 percent, and the minimum was increased to $100. In 1919, the capital tax was extended to all corporations. Virtually all such taxes were increased in 1934, when the tax rate on insurance premiums was advanced to 2.5 percent.

34. By 1939, Nova Scotia imposed taxes generally on both the capital and net income of all incorporated companies. However, banks paid taxes only on capital, places of business, and volume of business (measured, *inter alia*, by loans and deposits), loan companies paid only capital taxes, trust companies paid taxes only on capital and on gross income, finance companies paid only capital and place-of-business taxes, and other utilities and carriers paid taxes primarily on their capital or equipment, or, in certain instances, on their gross revenue (e.g., telephone companies with more than $30,000 paid-up capital paid a 3 percent gross income tax). In addition to capital taxes, public utilities were also liable for a 50 percent tax on their profits in excess of 8 percent of their assets. Insurance companies paid only a tax of 2½ percent on all insurance premiums. Municipalities were prohibited from imposing any license or franchise tax on companies taxed under these provisions, except to the extent of municipal assessments imposed prior to 1921.

35. Prince Edward Island in 1894 imposed semiannual (subsequently, annual) taxes ranging from $25 to $250 on banks, telegraph companies, and insurance companies. In 1924, the tax on life insurance companies became $300, plus 2 percent of premiums. The tax rate was reduced to 1 percent of premiums (minimum of $100) in 1925, but restored to 2 percent in 1937. From 1938 to 1941, Prince Edward Island imposed, as before, a general personal property tax, but various companies were excused from the personal property tax and instead paid a fixed annual tax. Thus, railway express companies paid $500 a year, loan companies paid $100 per year, and certain common carriers paid $150 per year. Accident and guarantee insurers paid fixed taxes of $50, $75, or $100 per year, and fire insurance companies paid $250 per year. Banks, in lieu of either of the kinds of taxes already described, paid whichever was more—$1,466 or a tax measured by the volume of their business (measured, *inter alia*, by loans and deposits). Chain stores or theaters paid whichever was less—a tax of $2,000 per branch or $500 per theater, or a tax equal to a percentage of their gross receipts. Certain utilities and other companies paid a fixed amount or a percentage of gross income, whichever was more. Life insurance companies continued to pay a tax of $100 or 2 percent of premiums, whichever was more, but other insurance companies were not taxed on their premiums.

36. In Saskatchewan, annual corporation taxes were imposed in 1907 on various banks and other lending or financial institutions, on carriers, and on utilities. In each case, the tax was dependent in amount on the company's capital, the number and location of its places of business, the volume of business done, or (in certain instances) on gross income. The tax on life insurance premiums was 1 percent and on other insurance premiums two-thirds of 1 percent. Failure to file a proper return and pay the correct tax could have resulted in loss of the right to do business in the province, and no municipality could tax the right to do business. In 1913, all premiums became taxable at 1 percent. In 1918, the premiums tax was placed on a graduated basis, and the rate ran from 1 percent (on the premiums not in excess of $50,000) to 2 percent (on premiums in excess of $200,000). The minimum tax, payment of which was an express con-

dition precedent to commencing business, was $100 or $175, depending on the size of the taxpayer. From 1934 to 1941, the tax rates on premiums were temporarily increased by 50 percent (so that they ranged from 1.5 percent to 3 percent) pursuant to statutes effective for one year each.

37. Prior to 1941, Newfoundland (which did not become a province until 1949) approached the taxation of corporations in a manner different from that of the provinces. The first premiums tax was imposed in 1922, and it applied only to fire insurance companies. The rate at first was 5 percent; and the tax on fire insurance premiums was in lieu of the ordinary income taxes that had been imposed on corporations generally since 1918. When the general income tax was repealed in 1925, the 5 percent fire insurance premiums tax was kept in operation, as was also a tax on banks and trust companies that was measured by volume of business (i.e., deposits, loans, etc.). In 1929, income taxes were reimposed, but no change was made in the existing taxes imposed on banks and fire insurance companies. In 1932, the premiums tax was extended for the first time to life insurance companies, the rate being 2 percent. The rate on fire insurance premiums was increased to 6 percent at that time also. These taxes on life and fire insurance premiums remained in effect at the same rates through 1941. No premiums tax appears to have been imposed on any other kind of insurance.

38. In Alberta, income taxes were first imposed on corporations generally in 1932, no change being made then in the existing premiums taxes. Section 4(e) of The Income Tax Act expressly exempted all mutual companies, and Section 8(2) expressly imposed the tax on various kinds of companies, including all insurance companies (except those, such as mutuals, that were exempted elsewhere in the statute). The rate was 4 percent on all profits exceeding $1,000. In 1935, a credit against income tax was provided for the special taxes paid on capital, places of business, premiums, and related subject matters, but mutual companies (including mutual insurance companies) remained expressly exempt from the income tax. In 1936, effective for the year 1935, the corporate income tax rate was increased to 5 percent; and, effective for the year 1937, the rates became graduated

from 3 percent to 12 percent. No change was made in the years 1935–1937 in the premiums taxes.

39. The first income tax in British Columbia was added, along with a tax on personal property, to the real estate tax in 1876. The income tax rate was 0.5 percent on income over $1,500, and the rate was increased in 1880 to 0.75 percent. In 1896, the tax became a graduated one, ranging from 1.25 percent to 1.75 percent, and in 1900 the rate went as high as 4 percent. In 1918, the graduated income tax rate was increased to as much as 10 percent, in 1921 to as much as 15 percent, and in 1932 to as much as 19 percent. In addition, a heavy surtax at graduated rates was added in 1933.

40. In Manitoba, income taxes were first levied on corporations generally in 1930. At first, the rate of tax was 2 percent, but this was increased to 5 percent in 1931. From 1937 until 1941, the income tax was levied at rates ranging from 1 percent to 19 percent. However, all mutual companies were, from the very beginning, expressly exempted from the income tax.

41. In New Brunswick, a general income tax was first imposed on corporations in 1938. From then until 1941, the rate of tax on profits was 1 percent, without graduation. Insurance companies and others subject to the special corporate taxes on various kinds of publicly regulated industries did not have to pay the income tax.

42. Income taxes were first imposed on corporations generally in Nova Scotia in 1939. The rate of tax in 1939 was 1 percent, and it was increased in 1940 to 2.5 percent. Corporations otherwise specially taxed were not subject to liability for the income tax.

43. Income taxes were first generally imposed by Prince Edward Island in 1894, the rate being 1 percent, but only the personal property or the income tax, whichever was greater, had to be paid. The tax rate from 1920 to 1941 was graduated from 1 percent to 10 percent, and was not changed in that period.

44. Saskatchewan first imposed income taxes on corporations in 1932, effective as of January 1, 1931. The tax rate at first was 4 percent, but this was increased to 5 percent effective in 1934. From the beginning, mutual companies were expressly exempted from the income tax. In 1939, an addi-

tional exemption was added to the income tax for corporations taxed under the Saskatchewan Corporations Taxation Act on their capital, property, equipment, places of business, or premiums.

45. (a) Newfoundland imposed income and excess profits taxes at the same time and in largely the same manner as the Dominion of Canada imposed such taxes (see findings 47–52). Thus, in 1917 an excess profits tax was levied, and in 1918 a net income tax was levied on corporations at a rate of 5 percent. Life insurance companies were exempt from the excess profits tax, and mutual corporations and life insurance companies (except for those amounts that were credited to shareholders' accounts) were expressly exempted from the income tax in language identical to that in the Dominion's income tax statute. In 1922, a mild graduation in corporate rates was established. The income tax was completely repealed in 1925, but was reimposed in 1929, at which time the corporate rate became 8 percent (without graduation). The exemption of mutual companies and life insurance companies was the same as under the prior provisions.

(b) In 1932, when Newfoundland's corporate income tax rate was increased to 12 percent (and a 2 percent premiums tax was first imposed on life insurance companies, as indicated in finding 33), it was specified that the tax on life insurance premiums was to be in lieu of all other taxes imposed on income. With respect to mutual life insurance companies, which were already exempted from the income tax by the provisions in Section 7(e) of the Income Tax Act covering all mutual insurance companies, the 1932 legislation expressly provided that, notwithstanding Section 7(e), the new 2 percent premiums tax on life insurance companies should be applicable to mutual life insurance companies.

46. In 1941, immediately prior to the time when the various Wartime Tax Agreements went into effect, there was in effect in each of the provinces of Canada an income tax statute of general application and a premiums tax statute applicable to insurance companies. The relevant portions of the 1941 provisional statutes provided as follows:

1) In Alberta, section 8(3) of The Income Tax Act permitted insurance companies a credit against their income tax liability for the amount of the premiums

taxes paid by them pursuant to section 10(1) of The Corporations Taxation Act.

2) In British Columbia, section 32A. (1) of the Income Tax Act imposed a premiums tax on life insurance companies "in lieu of all tax otherwise imposed by this Act."

3) In Manitoba, section 4(t) of The Income Taxation Act provided as follows:

> 4. The following incomes shall not be liable to taxation hereunder:
>
> * * * * *
>
> (t) The income of corporations paying taxes under "The Corporations Taxations Act";
>
> * * * * *
>
> Section 3(e) of the Manitoba Corporations Taxation Act imposed a premiums tax on "[e]very insurance company which transacts such business in the province * * *"

4) In New Brunswick, section 25(2) of the Corporations Tax Act provided that the income tax "shall not apply to companies paying taxes under Sections * * * 6, 7, * * * of this Act." Sections 6 and 7 of the Act imposed premiums taxes on insurance companies.

5) In Newfoundland, section 4(3)(b) of The Income Tax Act imposed a premiums tax on life insurance companies "in lieu of all other taxes under this Act * * *"

6) In Nova Scotia, section 20A(1) of The Corporations Tax Act provided that the income tax "shall not apply to companies paying taxes under Sections 4 to 17 of this Act, * * * Section 7 of the Nova Scotia Corporations Tax Act imposed premiums taxes on insurance companies.

7) In Ontario, section 14(3)(h) of The Corporations Tax Act provided as follows:

> (3) The following incorporated companies shall not be liable to the [net income] tax imposed by this section:
>
> * * * * *
>
> (h) Any incorporated company paying taxes under this Act as a[n] * * * insurance company * * *

Section 4 of the Act imposed premiums taxes on insurance companies.

8) In Prince Edward Island, section 4(s) of The Income Tax Act provided as follows:

> 4. The following incomes shall not be liable to [net income] taxation hereunder:
>
> * * * * * *

(s) The income of the following classes of taxpayers derived from their chief occupation, trade or business provided they pay taxes under the Personal Property and Special Companies Taxation Act, 1938;

* * * * *

(iii) All companies or institutions doing business of life insurance in the province * * *

Section 45(p) of the Personal Property and Special Companies Taxation Act of Prince Edward Island imposed premiums taxes on insurance companies.

9) In Quebec, subdivision 3 of section 3 of the Corporation Tax Act imposed premiums taxes on insurance companies. Section 6 of the Act imposed a net income tax on "each company, partnership or person contemplated by subdivisions 1, 4, 5, 6, 7, 8, 11, 13, 14, 15, 16, 17, 18 and 19 of Section 3, * * *"

10) In Saskatchewan, section 4 of The Income Tax Act provided as follows:

4. The following incomes shall not be liable to [net income] taxation hereunder.

* * * * *

(m) The income of corporations paying taxes under sections 4 to 19 inclusive of *The Corporations Taxation Act*.

History of Dominion Taxes on Insurance Companies, 1915–1941

47. Prior to 1915, the Dominion of Canada did not impose any taxes on income, profits, volume of business, or capital. In 1915, under the impetus of the First World War, the Dominion enacted the Special War Revenue Act, which levied an excise on various items, including bank notes, checks, bills and notes, money orders, railway tickets, telegraph messages, perfumes, wines, and patent medicines. Part I of the Special War Revenue Act also imposed, *inter alia*, a tax of 1 percent on premiums for insurance other than life or marine insurance. Mutual insurance companies licensed to do business in Canada were exempt from the premiums tax. Insurance companies were required to file their returns and pay the premiums tax to the Superintendent of Insurance, who was empowered to examine the books and records of the taxpayers, to verify the returns, and to remit the tax to the Minister of Finance.

48. The tax on insurance premiums was repealed in 1929, but in 1932 the tax was reimposed on premiums for insurance other than life or marine insurance. The new rate became 1 percent in the case of stock companies and most mutual companies, and 2 percent in the case of reciprocal exchanges or mutual companies doing business on the premium note plan. No other changes in the Dominion premiums tax occurred until 1941.

49. By 1941, the excises imposed by the Special War Revenue Act, including the premiums tax, had matured into a permanent system of general taxation on commercial activities measured solely by sales or other indicia of the volume of business transacted. A major feature of this volume-of-business tax was the manufacturers' sales tax. This tax system was developed separate and apart from the development of any other Canadian system of taxation. Subsequent to 1941, the Special War Revenue Act was renamed the Excise Tax Act, which is its present name.

50. (a) In 1916, the Dominion enacted an excess profits tax act, which remained in effect until December 31, 1920. This was the first tax on income or profits imposed by the Dominion. The several taxes imposed under Part I of the Special War Revenue Act, enacted the previous year (see finding 44), were allowed as credits against the excess profits tax. Life insurance companies were expressly exempted from the excess profits tax act. There were no statutory exemptions for mutual companies, partnerships, or certain other entities subsequently exempted from income taxes.

(b) In debating in the Canadian parliament the advisability of exempting or taxing the excess profits of life insurance companies, the spokesman for the Canadian Government and speakers on both sides of the issue agreed that the participating policyholders of life insurance companies should not be made to bear the burden of paying income or profits taxes (by means of increased premiums, decreased dividends, or otherwise) because of the special social utility of, and public policy favoring, the purchase of life insurance. Historically, the discussion centered primarily only over the question of taxing the profits allocable to stockholders.

(c) At least since 1910, the Insurance Act and its successors have required Canadian stock life insurance com-

panies to distribute to their participating policyholders 90 percent or more of their profits from both underwriting and investment sources. In computing such profits for the purpose of determining the policyholders' shares thereof, premiums taxes, if any, as well as all other ordinary business expenses, were deducted, reducing pro rata the share allocable to the policyholders. Income taxes were not deducted, however, and had to be paid solely out of the shareholders' portions of the profits.

51. The Dominion levied a general tax on net incomes for the first time in 1917. The rate on individuals was graduated, while the rate on corporations was a flat 4 percent on net income above $3,000. By express provisions in the statute, partnerships and other unincorporated entities, such as Lloyd's or reciprocal exchanges, and mutual corporations (including all mutual insurance companies), and, after 1930, cooperatives, *inter alia*, were not liable for the income tax. Other taxpayers were permitted to credit against their income tax liabilities the amount of excess profits taxes paid under the Business Profits War Tax Act of 1916 and the excise taxes (including the premiums tax) paid under Part I of the Special War Revenue Act of 1915. Life insurance companies were subject to the income tax only on the "amount * * * credited to shareholders' account[s]," and since the tax was payable only from the share of the profits allocated to shareholders under the Insurance Act, participating policyholders did not bear any responsibility, directly or otherwise, for the payment of the income tax.

52. As the statutes were construed by the administrative authorities, the Department of Insurance could not have prevented nonresident stock life insurance companies from passing on to their Canadian policyholders the economic burden of the Canadian income tax. Hence, only resident stock life insurance companies were deemed by the administrative authorities to have "shareholders' account[s]" within the meaning of the Income War Tax Act. As a result of the combined statutory and administrative limitation of the income tax to amounts credited by Canadian life insurance companies to their shareholders' accounts, nonresident stock life insurance companies, as well as both resident and nonresident mutual life insurance companies, were con-

sidered free of any duty to pay tax under the Income War Tax Act of 1917. Nonresident stock companies were taxed on their non-life insurance business, however, as though they were not life insurance companies.

53. Although originally intended to be only a temporary revenue measure for the war period, the Income War Tax Act of 1917 ultimately became a permanent method of taxation; and in 1947 it was replaced by a very similar statute entitled The Income Tax Act. It paralleled in development the general system of taxing the volume of business under the Special War Revenue Act of 1915, but its growth was independent in detail and purpose.

54. Except as otherwise stated herein and except for some changes in rates prior to 1927 (it was 9 percent on corporations by 1927), there were no significant changes in the Dominion's basic income tax laws from 1917 to 1941. In 1928, rates were reduced to 8 percent effective for 1927; they were increased to 10 percent effective for 1930; to 11 percent for 1931; to 12.5 percent for 1932; and to 18 percent for 1939. In addition, an excess profits tax was enacted effective for the year 1940, increasing the basic corporate rates by an additional 12 percent (to a total of 30 percent) and imposing a tax of up to 75 percent (later up to 100 percent) on excess profits. Exemptions from the excess profits tax paralleled those under the income tax provisions.

55. Under the general provisions of the Income War Tax Act of 1917, nonresidents were not deemed taxable on investment income derived from Canadian sources. However, under Section 9B, added in 1933, nonresidents were required to pay a 5 percent withholding tax, without any deductions or credits, on the gross amount of specified kinds of investment income from Canadian sources. By regulation, the Minister of Finance, exercising the prerogatives granted him in the enacting statute, ruled that any company (including an insurance company) duly licensed to do business in Canada was to be considered a resident of Canada for the purposes of Section 9B and, therefore, was to be exempt from the tax imposed by that section. Subsequently, Section 9B became Part III of the Income Tax Act, and the 5 percent rate was increased to 15 percent.

A premiums tax was first imposed by the Dominion of Canada in 1915, and was imposed only on casualty premiums. Prior to 1941, the Dominion had never imposed any premiums or income taxes on mutual life companies.

The Wartime Tax Agreements and Tax Rental Agreements

56. Prior to 1941, there was little or no uniformity or consistency between the taxing statutes of the Dominion and the various provinces, and it was possible for income or property to be taxed once, several times, or not at all. In 1937, the Royal Commission on Dominion-Provincial Relations, also known as the Rowell-Sirois Commission, was created to study this problem. It made various recommendations, primarily to the effect that the Dominion should have the exclusive power to levy and collect the taxes then being imposed by the provinces.

57. Under the impetus of the Second World War and the concommitant need for substantial increases in tax revenues, steps were taken along the lines suggested by the Rowell-Sirois Commission. The nine provinces executed with the Dominion certain agreements, known as the "Wartime Tax Agreements," in which they agreed, *inter alia*, to suspend or repeal their corporation tax statutes in return for specified payments from the Dominion Government.

58. The Wartime Tax Agreements expired in 1946, but, except as stated hereinafter, all the provinces entered into new agreements with the Dominion along substantially similar lines for successive five-year periods from 1947 through 1951, from 1952 through 1956, and 1957 through 1961. These new agreements were known as the "Tax Rental Agreements." Newfoundland became a province and entered into the Tax Rental Agreements starting in 1949. Quebec did not enter into a Tax Rental Agreement for any period after 1946. Ontario refrained from entering into any such agreement for the period from 1947 through 1951, but entered into an agreement for 1952–1956. Although Ontario entered into an agreement for the period from 1957 to 1961, it was a limited one and corporate taxes were excluded from its operation. Thus, Ontario, during the period 1947–1951 and at at all times after 1956, and Quebec at all times after 1947, imposed their own corporate taxes.

59. The impact of the new or increased Dominion's income and excess profits taxes in 1940 and 1942 more than offset, in the usual situation, the elimination of the provincial taxes resulting from the implementation of the Wartime Tax Agreements. However, in the case of most insurance companies (the major exception possibly being the stock fire and casualty insurance companies), the tax revenues theretofore collected by the provinces would not have been captured by the increases in the Dominion's income and excess profit taxes. To gather in such revenues, and in order to prevent a windfall to the insurance industry by reason of the elimination of provincial taxes at a time when such revenues were needed by the Dominion Government, it was decided by the Dominion Government to levy, in addition to all existing taxes, a 2 percent tax on all insurance premiums. Accordingly, a 2 percent premiums tax was imposed by the Dominion on all life insurance companies, which theretofore had not paid any Dominion premiums taxes; and the 1 percent and 2 percent premiums tax theretofore paid to the Dominion by the mutual non-life insurance companies was increased to 3 percent and 4 percent, respectively. The stock non-life insurance companies, prior to 1941, had been allowed to reduce their Dominion income tax liabilities by credit for the amount of their Dominion premiums tax liabilities, and, as a result, they had not been, for all practical purposes, additionally burdened by the 1 percent premiums tax imposed on them by the Dominion prior to 1941. Therefore, in order to ensure that the actual burden of the Dominion premiums tax borne by such companies would be increased to 2 percent, the Dominion's tax rate on their premiums was increased to 2 percent and their credit against the Dominion income taxes was eliminated. In this way, each and every insurance company (other than marine insurance companies, which remained entirely exempt at all times from Dominion premiums taxes) was burdened with an additional 2 percent premiums tax.

As a result of these "Wartime Tax Agreements", the Dominion for the first time imposed a tax on life insurance premiums, effective for the year 1941. The rate was two percent. The Minister of Finance for the Dominion stated in the course of the parliamentary debates on the 1942 Special

War Revenue Act Amendments that the Dominion premiums tax to be imposed on life insurance premiums was "as a result of the provincial [Wartime Tax] agreements" and that these Dominion premiums taxes were being imposed "in place of the provincial [premiums] taxes." The Dominion premiums tax rate of two percent on life insurance premiums was decided upon because that was approximately the average provincial premiums tax rate which had theretofore been applicable. The intent of the Dominion tax authorities was that the tax status and liability of all insurance companies should be substantially the same as it was under the provincial tax statutes which had been in effect in the pre-1941 period. In 1942, the Dominion also increased its general income tax rates but no change was made in the income tax status of mutual life insurance companies. They remained exempt from income taxes. The Dominion did not impose any paid-up-capital, place of business or other special corporate taxes which had been surrendered by the provinces. As a result of the execution of the "Wartime Tax Agreements", the Dominion agreed to pay each province a certain amount as compensation for that province's loss of revenue caused by its surrender of its tax rights to the Dominion.

Other Changes in Dominion Taxes After 1941

60. In 1946, the Royal Commission on Cooperatives, also known as the McDougall Commission, completed its studies on the taxation of coperatives and related entities that had theretofore not been subjected to income taxes, and concluded that coperatives and mutual non-life insurance companies realized profits that should be taxed. It did not recommend any changes in the taxation of life insurance companies for the same reason that life insurance companies had not been taxed since 1917 (see finding 52). The Commission also suggested that changes in the taxation of mutual non-life insurance companies should be accompanied by a reexamination of both the premiums taxes that such companies were paying and the special tax treatment accorded the investment income of nonresident insurance companies. Following this report, the statutory exemption of mutual non-life insurance companies from income tax was repealed

and the premiums tax rate on such companies was reduced from 4 (or 3) percent to the same 2 percent that was being paid by both stock insurance companies and mutual life insurance companies. At the same time, the premiums tax rate on reciprocal exchanges was reduced from 4 percent to 3 percent, although they remained exempt from income tax.

61. In 1953, partly as a response to the McDougall Commission's recommendations concerning the taxation of the investment income of nonresidents, the Minister of Finance modified the Income Tax Regulations under Part III of the Income Tax Act (formerly Section 9B of the Income War Tax Act). Thereafter, nonresident insurance companies were liable for the 15 percent withholding tax imposed by Part III on their gross Canadian investment income. However, under the insurance laws, nonresident insurance companies were required to maintain assets in Canada at least equal in value to their Canadian liabilities and, accordingly, the regulations provided that the tax under Part III was not to be assessed on that part of their investment income that was derived from those assets in Canada that did not exceed their liabilities to Canadian policyholders (or, in the case of life insurance companies, did not exceed 110 percent of such liabilities). No other adjustment in premiums or income tax liabilities was associated with this change in the income tax picture.

62. The Supreme Court of Canada held in the case of *Stanley Mutual Fire Insurance Co.* v. *Minister of National Revenue* [1953], 1 S.C.R. 442, 53 D.T.C. 1119, that a mutual insurance company did not, by virtue of its underwriting activities, realize any profits that were recognized under the Income Tax Act, and, hence, notwithstanding the revocation of the exemption of mutual insurance companies from the income tax in 1947 and the asserted legislative purpose underlying that revocation, such companies owed no income tax on their gains from writing insurance policies, but were liable for income tax, if at all, only on their investment income. Although the company involved in the case just cited was not a life insurance company, the principal authority upon which the Canadian Supreme Court relied was the decision of the House of Lords in the English case of *New York Life*

Insurance Co. v. *Styles*, 14 App. Cas. 381 (House of Lords, 1889), involving a mutual life insurance company.

63. In 1955, the Canadian Parliament overcame the effect of the Canadian Supreme Court's decision mentioned in finding 59 by amending the Income Tax Act to include gains from underwriting sources within the definition of the taxable income of mutual non-life insurance companies. The Parliament expressly worded the amendment so as to avoid any change in the definition of the taxable profits of mutual life insurance companies.

64. During the years at issue in this case, the Dominion of Canada imposed an income tax of general application under Part I of the Income Tax Act. (Rev. Stat. of Canada, 1952, ch. 148, § 2, as amended, effective for the years 1953 through 1955 and 11–12 Geo. VI, ch. 52, §2, 1948, as amended, effective during the years 1949 through 1952.

65. During the years at issue in this case, a mutual life insurance company doing business in Canada was completely exempt from the income tax imposed under Part I of the Dominion Income Tax Act, and Equitable accordingly was not required to pay, and in fact did not pay, to the Dominion of Canada any income tax imposed by Part I of the Dominion Income Tax Act.

66. In 1956, pursuant to the Federal-Provincial Tax-Sharing Arrangements Act (4–5 Eliz. 2, ch. 29, 1956), the Dominion repealed its premiums tax provisions effective for 1957 and subsequent years, in order that the various provincial governments could impose their own premiums tax. A premiums tax was thereupon imposed by all Canadian provinces.

Provincial Taxes After 1941

67. Both Quebec and Ontario from 1947 to 1951, and Quebec from 1952 to 1956, imposed many of the same taxes (except for changes in rates) that they had imposed prior to the consummation of the Wartime Tax Agreements in 1941. In both provinces, the premiums tax was changed to a flat 2 percent rate on all insurance premiums (in Ontario, marine insurance remained free of the premiums tax), and the general corporate income tax rate became 7 percent. From 1947

to 1951, the other eight provinces that entered into Tax Rental Agreements all imposed pursuant to those agreements a uniform income tax on corporations equal to 5 percent of income, as defined in the Dominion Income Tax Act. This tax was collected by the Dominion for those provinces, and stock life insurance companies and stock and mutual fire and casualty insurance companies paid this tax also. The 5 percent tax was absorbed by the Dominion in 1952 via a rate increase, and a credit was given for income earned (and taxed) in Quebec. In 1957, a credit was also given for income derived from Ontario sources.

68. After the Second World War, the Dominion began repealing various excise taxes, such as those on gasoline, electricity, and gas, in order to give the provinces an appropriate domain for obtaining tax revenues for themselves. One of the excises repealed as part of this process was the Dominion's insurance premiums tax, effective at the end of 1956. No modifications in Dominion income taxes were associated with any of these repeals. After the repeal of the Dominion premiums tax, each province thereupon enacted a 2 percent premiums tax on insurance companies. With only insignificant variations, the provincial statutes were uniform and modeled upon the Dominion statute just repealed.

69. In 1957, subsequent to the taxable years at issue in the present cases, both Quebec and Ontario made substantial changes in their income tax statutes and, in large part, adopted the definitions, deductions, and exemptions pertaining to insurance companies that were then used in the Dominion's statutes. Thereafter, the income of all insurance companies was subject to income tax in those two provinces to the same extent that it was taxable under Part I of the Dominion's income tax statute. Insurance companies continued to be exempt from the taxes measured by capital or places of business that were generally imposed on corporations by Quebec and Ontario.

Miscellaneous

70. Geographically, the Canadian income tax system covers worldwide profits. In the case of domestic taxpayers, therefore, no distinction is made between profits derived from Ca-

nadian sources and those derived elsewhere. Premiums taxes, however, are not imposed on transactions having no direct connection with or situs within Canada. Thus, if a premium is received outside of Canada and is for a risk located entirely outside of Canada, no tax on the premium is due.

71. In the period from 1947 to 1956, the following insurance companies paid a 2 percent premiums tax in addition to the ordinary income taxes: (i) mutual fire and casualty companies (except that residents did not pay tax on underwriting gains until 1954, and nonresidents, in all cases listed herein, paid tax on investment income, if at all, only under Part III and after 1953); (ii) stock fire and casualty companies; (iii) resident stock life companies (but only on profits allocable to stockholders); and (iv) nonresident stock life companies (but only on underwriting profits from their accident and health, or other non-life, insurance business). The following insurance companies paid the same 2 percent premiums tax, but paid no income tax: (v) mutual life companies; and (vi) nonresident stock life companies (except as to underwriting profits from accident and health, or other non-life, insurance business). The following insurance companies paid a 3 percent premiums tax, but no income tax: (vii) reciprocal exchanges; and (viii) Lloyd's. Except for the 2 percent premiums tax in Quebec, the following insurance companies paid no premiums tax, but did pay the regular income tax: (ix) resident stock marine companies; and (x) resident mutual marine companies, but only after 1947 on investment income and after 1953 on underwriting income. Except for the 2 percent premiums tax in Quebec, the following insurance companies paid neither the premiums tax nor the income tax: (xi) nonresident marine companies.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover on the foreign tax credit issue, and it is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of one hundred twelve thousand one hundred fifty-eight dollars

and eighty-six cents ($112,158.86,)[2] together with interest as provided by law.

Paragraph 10 of the respective petitions in cases Nos. 559–58 through 563–58 is dismissed for lack of prosecution.

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[2] The parties have stipulated the amount of the recovery on this issue, in the event of a decision favorable to plaintiff on the basic legal question.

APPENDIX B

Sections 901 (a) and (b)(1) and 903 of the Internal Revenue Code of 1954 (26 U.S.C.) provide:

SEC. 901. TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS OF UNITED STATES.

(a) *Allowance of Credit.*—If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) plus, in the case of a corporation, the taxes deemed to have been paid under section 902. Such choice may be made or changed at any time prior to the expiration of the period prescribed for making a claim for credit or refund of the tax against which the credit is allowable. The credit shall not be allowed against the tax imposed by section 531 (relating to the tax on accumulated earnings), against the additional tax imposed for the taxable year under section 1333 (relating to war loss recoveries), or against the personal holding company tax imposed by section 541.

(b) *Amount Allowed.*—Subject to the limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

(1) *Citizens and domestic corporations.*—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and

* * * * * *

[26 U.S.C. (1958 ed.) 901.]

SEC. 903. CREDIT FOR TAXES IN LIEU OF INCOME, ETC., TAXES.

For purposes of this subpart and of section 164(b), the term "income, war profits, and excess profits taxes" shall include a tax paid in lieu of a tax on income, war profits, or excess profits otherwise generally imposed by any foreign country or by any possession of the United States.
[26 U.S.C. (1958 ed.) 903.]

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.903–1 *Definition of taxes in lieu of income, war profits, or excess profits taxes.*

(a) *In general.* For the purposes of subpart A (section 901 and following), part III, subchapter N, chapter 1 of the Code, and section 164(b)(6), and 275(a), the term "income, war profits, and excess profits taxes" includes a tax imposed by statute or decree by a foreign country or by a possession of the United States if—

(1) Such country or possession has in force a general income tax law,

(2) The taxpayer claiming the credit would, in the absence of a specific provision applicable to such taxpayer, be subject to such general income tax, and

(3) Such general income tax is not imposed upon the taxpayer thus subject to such substituted tax.

(b) *Example.*—The application of section 903 may be illustrated by the following example:

Example.—The A Corporation does business in X country, which imposes an income tax upon substantially a taxable income base. The ascertainment of taxable income, though not the determination of gross income, from sources in X country is found administratively difficult. The

X country by decree, provides that corporations circumstanced as was the A Corporation would, in lieu of the income tax at the rate of 20 percent otherwise payable, be subject to tax at the rate of 10 percent upon the amount of gross income from X country. In accordance with such decree the A Corporation paid X country the sum of $25,000 in 1955 with respect to its tax liability to the X country for the year 1954. Such amount, subject to the applicable limitations, is available as a credit to the A Corporation as foreign income, war profits, or excess profits taxes against the United States tax liability for the year 1954.

[26 C.F.R., Sec. 1.903–1.]

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SUPREME COURT, U. S.

FILED

APR 4 1967

JOHN F. DAVIS, CLERK

No. 1144

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED STATES, *Petitioner,*

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENT IN OPPOSITION

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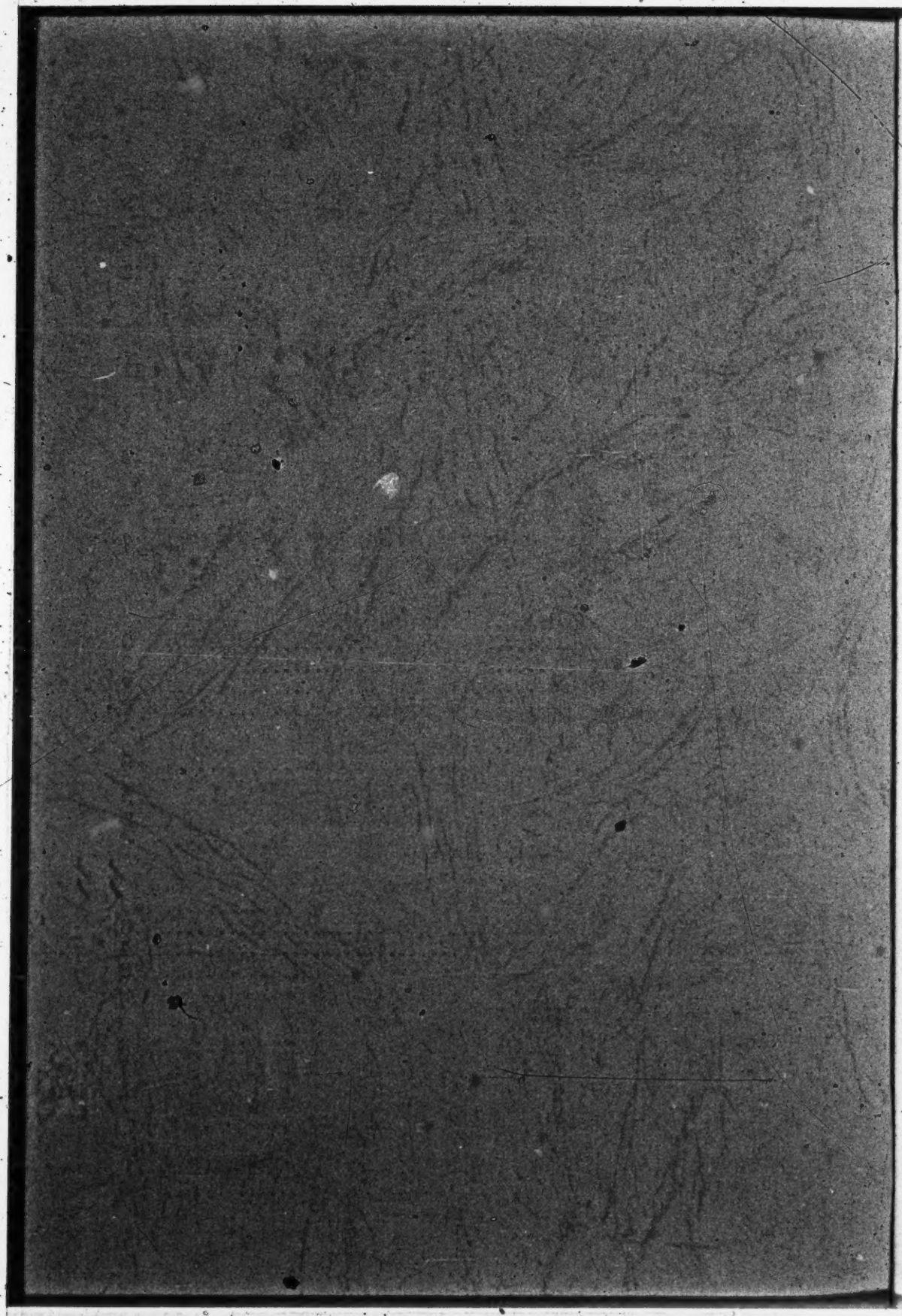

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 1144

UNITED STATES, *Petitioner*,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether premiums taxes paid by the respondent, a mutual life insurance company, to the Dominion of Canada and to the provinces of Ontario and Quebec, each of which also imposed an income tax of general application from which mutual life insurance companies were exempt by specific statutory provisions, were "paid in lieu of" income taxes so as to be allowable as a credit against United States income taxes.

STATUTE AND REGULATIONS INVOLVED

Section 901 of the 1954 Internal Revenue Code allows a credit for income taxes paid to any foreign country; section 903 of the Code expands the definition of income taxes to include taxes paid in lieu of income taxes:

> "SEC. 903. CREDIT FOR TAXES IN LIEU OF INCOME, ETC., TAXES.
>
> "For purposes of this subpart and of sections 164(a) and 275(a), the term 'income, war profits, and excess profits taxes' shall include a tax paid in lieu of a tax on income, war profits, or excess profits otherwise generally imposed by any foreign country or by any possession of the United States."

The Treasury Regulations under this section of the Code (which have been in force without substantial modification since enactment of the "in lieu of" credit provision in 1942) provide

> "* * * the term 'income, war profits, and excess profits taxes' includes a tax imposed by statute or decree by a foreign country or by a possession of the United States if—
>
> "(1) Such country or possession has in force a general income tax law,
>
> "(2) The taxpayer claiming the credit would, in the absence of a specific provision applicable to such taxpayer, be subject to such general income tax, and
>
> "(3) Such general income tax is not imposed upon the taxpayer thus subject to such substituted tax." (Reg. 1.903-1(a).)

STATEMENT

Respondent, a mutual life insurance company incorporated in New York, transacted business in Canada during the years involved in this action, 1950-55. The Dominion government and the provinces of Ontario and Quebec imposed income taxes of general application, from which mutual life insurance companies such as respondent were exempt by virtue of specific statutory provisions. However, Ontario and Quebec each imposed on such companies a tax of 2 per cent on premiums received from policyholders residing within the province, and the Dominion imposed a similar tax on premiums received from policyholders residing in the other Canadian provinces.

Since before the beginning of this century, the provinces of Ontario and Quebec have imposed premiums taxes on mutual life insurance companies. These provinces enacted income taxes of general application for the first time in 1932, but mutual life insurance companies were exempt from such taxes. (Findings 22 and 26).[1]

During the years at issue in this case, the corporate tax statutes of Ontario and Quebec by their terms exempted insurance companies from income taxes because they paid premiums taxes. The 1950 Ontario Corporations Tax Act provided that the generally applicable Ontario corporate income tax "shall not be imposed" on any company "that pays taxes under this Act as a[n] . . . insurance company . . . ." (Finding 27). The only taxes payable under the Act by an insurance company were premiums taxes. The legis-

[1] References are to the numbered Findings of Fact made by the court below which are reprinted in Appendix A of the Petition.

lative history of the predecessor of this statutory provision makes it clear that the Ontario legislature deliberately exempted insurance companies from the income tax because they were "specially taxed" on premium receipts. (Finding 27).

The Quebec Corporation Tax Act imposed an income tax on "every incorporated company . . . which is not otherwise specially taxed under" certain enumerated subdivisions. Since respondent was "otherwise specially taxed" as an insurance company under a subdivision imposing premiums taxes, it was therefore exempt from the Quebec income tax. (Finding 23).

A similar pattern is reflected in the taxing systems of the other provinces of Canada: premiums taxes were historically imposed on insurance companies; income taxes were not. By 1941, all of the provinces had in effect both a premiums tax and an income tax and, as the provincial statutes demonstrate, insurance companies were exempt from the income tax because they were paying premiums taxes. (Findings 28-46).[2]

Prior to World War II, the Dominion government had never imposed either premiums taxes or income taxes on mutual life insurance companies. (Finding 55). Since 1917, the Dominion income tax statute had exempted life insurance companies except for amounts "credited to shareholders' account[s]"; mutual life companies, having no shareholders, were thus exempt from income tax. (Finding 51). Effective in 1941, the Dominion and all of the provinces entered into "War-

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[2] In British Columbia and Newfoundland, for example, the statutes specifically provided that the premiums taxes were "in lieu of" all other taxes. See generally Finding 46, which sets forth the pertinent statutory provisions in effect in 1941 in the provinces.

time Tax Agreements," pursuant to which the provinces repealed or suspended the operation of most of their corporate taxes, including premiums and income taxes, and "rented" those taxes to the Dominion in return for specified payments from the Dominion. These tax rental agreements, which were originally conceived as a wartime emergency measure, were extended through 1951 with all provinces except Ontario and Quebec, and through 1956 with all provinces except Quebec. (Findings 56-59).

In 1941, in partial implementation of the wartime rental agreements described above, the Dominion taxed mutual life insurance companies for the first time. Confronted with a choice as to how best to raise wartime revenues from the life insurance industry, the Dominion chose to impose a premiums tax—at approximately the same average rate that had been in effect in the provinces—and refrained from imposing an income tax. The intent of the Dominion tax authorities was that the tax status and liability of all insurance companies under the new Dominion taxes should be substantially the same as under the pre-War provincial statutes. (Finding 59).[3]

The premiums taxes paid by the respondent during the years 1950-55 pursuant to the statutes described in the foregoing paragraphs totaled $112,158.86, of which $18,845.17 was paid to Ontario for the years 1950-52, and $23,580.93 to Quebec and $69,732.76 to the Dominion for the years 1950-55. (Finding 18).

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[3] The Minister of Finance stated that the Dominion premiums taxes were being imposed "as a result of the provincial [Wartime Tax] agreements" and "in place of the provincial [premiums] taxes." (Finding 59).

The court below examined the taxing systems in the Dominion and the provinces, in accordance with the criteria prescribed in the Treasury Regulations quoted above (p. 2), and concluded that the legislative decisions, by the provinces in the 1930's not to extend the income tax to mutual life companies but to continue the premiums tax, and by the Dominion in 1942 to adopt the provincial pattern when it first imposed any tax on such companies, constituted "deliberate selection[s] between a special method of raising revenue and a general method. . . . In other words," the court said, "both the Dominion and the provinces decided to impose or retain the premiums tax because these insurance companies were not being asked to pay income taxes. . . ." (Petition, p. 24). It accordingly held that the premiums taxes were "in lieu of" income taxes and were allowable as a credit against United States income taxes under the relevant sections of the Code.[4]

REASONS FOR DENYING THE WRIT

The decision of the court below is a carefully considered and clearly proper application of the "in lieu of" tax credit provision. The application is proper because the court correctly resolved what is essentially a question of fact—the relationship between Canadian income and premiums taxes in their application to mutual life insurance companies. The decision has no such broad implications as the Petition perceives. It

[4] In so holding, the court followed its two earlier decisions which involved precisely the same issue: The Prudential Ins. Co. v. United States, 319 F.2d 161 (Ct. Cl. 1963), and The Prudential Ins. Co. v. United States, 337 F.2d 651 (Ct. Cl. 1964). A district court in California has reached the same conclusion. Occidental Life Ins. Co. v. United States, 250 F. Supp. 130 (S.D. Cal. 1965).

is not, and is not claimed to be, in conflict with any decision of this Court or any lower Federal court.[5] It applies the very test prescribed by the Treasury in its Regulations and does not in any way broaden the scope of the law or enunciate principles of general application. Accordingly, review by this Court is not warranted.

1. The Petition rests upon a misconception of what the court below decided. The court did not, tacitly or otherwise, adopt "the view that all a taxpayer need show to credit a foreign excise tax is that he is exempt from the foreign jurisdiction's income tax." (Petition, p. 10). The more sophisticated view that it did take appears from the following passage in the second of the two earlier cases in which it decided the same issue in favor of another mutual life insurance company:

> "The various materials defendant presents in this case fail to demonstrate that there was not a very close connection between the imposition of the Canadian premiums taxes involved here and the failure to impose income taxes. On the contrary, we are persuaded by the history and terms of the various Canadian taxing acts that these premiums taxes were paid 'in lieu of' income taxes imposed on others." *The Prudential Ins. Co.* v. *United States,* 337 F.2d 651, 654 (Ct. Cl. 1964).

Additional historical materials were belatedly brought forward and fully developed by petitioner in the in-

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[5] The only other relevant Court of Appeals decision is consistent with the decisions of the Court of Claims. In Northwestern Mutual Fire Ass'n v. Commissioner, 181 F.2d 133 (9th Cir. 1950), the court held that, during 1942 and 1943, when mutual casualty companies in Canada paid premiums taxes but were exempt from income taxes, the premiums taxes they paid were in lieu of income taxes.

stant case and the decision below reflected "full review of the more extensive record of the legislative history of the Canadian tax statutes now before us." (Petition, p. 17). That history comprehended more than a half century of Canadian tax experience and included statutes, legislative debates, court decisions, and administrative determinations. Thus, it was only after inquiry into all of the evidence of statutory action and intention that the court concluded that the Dominion and the provinces determined to utilize a special method of exacting revenue from mutual life insurance companies, *i.e.*, premiums taxes, rather than to require them to pay income taxes.

It is clear, therefore, that the court did not view as irrelevant the indications urged by petitioner as showing that the premiums taxes were not in lieu of or a substitute for income taxes in the Dominion and the two provinces. (Petition, p. 8). It considered them at length and rejected them as unpersuasive. In so doing it made the very inquiry prescribed by petitioner's own Regulations (Petition, p. 25), and petitioner's failure to charge any disregard of the Regulations is further evidence that what is sought here is merely review by this Court of the resolution by the court below of a factual dispute between the parties.

2. The decision of the court below does not broaden the credit beyond its intended scope. The suggestion (Petition, p. 8) that gross receipts taxes should be regarded as "in addition to," rather than substitutes for, an income tax is historically unsound. When Congress amended the foreign tax credit provisions by the Revenue Act of 1942 to include "in lieu of" taxes it specifically had in mind taxes measured by "gross

income, gross sales or number of units produced."[6] Congress in that same Revenue Act provided a premiums tax as an alternative basis for computing the Federal income tax liability of mutual casualty companies.[7] Moreover, despite the emergence and growing importance of income tax statutes in the states of this country, the premiums tax is still generally utilized as the method for exacting revenues from insurance companies as a substitute for the income tax. (Petition, pp. 19-20). In the District of Columbia, Congress itself has specifically provided that premiums taxes "shall be in lieu of all other taxes" except real estate taxes and fees imposed under the insurance laws, (D.C. Code § 47-1806 (1961 Ed.)), and has exempted from the District income tax insurance companies that pay the District premiums tax. (D.C. Code, § 47-1554(g) (1961 Ed.)).

In expanding the Revenue Code credit provisions to include taxes paid in lieu of income taxes, Congress indeed had in mind, as petitioner notes, the "administrative problems" which had prompted the enactment in some foreign countries of simpler taxes as a substitute for the income tax. (Petition, p. 6). One need not look beyond the experience of Congress itself to appreciate that there are few, if any, areas of tax law that have presented more complexities than life insur-

[6] S. Rep. No. 1631, 77th Cong., 2d Sess. (1942); 1942-2 Cum. Bull. 504, 602.

[7] Section 207 of the 1939 Code and section 821 of the 1954 Code, prior to 1963 amendment. In 1955, Congress again enacted a premiums tax, this time as an alternative method of taxing life insurance companies on income from certain non-life business. (Section 802 of the 1954 Code, as amended by the Life Insurance Company Tax Act of 1955).

ance. Since 1913 the imposition of income taxes on life insurance companies has been an erratic process of experimentation that is still continuing.[8] The Canadian choice of a simple premiums tax in place of an income tax surely reflects the very kind of solution of "administrative problems" that the "in lieu of" provision was designed to encompass.[9]

3. The Petition sees special significance in the fact that in the Dominion some insurance companies were required to pay both a premiums tax and an income tax. (Petition, p. 9). The argument appears to be that if the premiums tax is not in lieu of an income tax for all companies, it cannot be so regarded in the case of any company. Such a contention presupposes that there normally is, or should be, similar tax treatment for the several categories of insurance companies, whereas the fact is that both the Dominion and the United States have always taxed life insurance companies differently from other insurance companies. It also overlooks the complete consistency in the tax treatment in Canada of mutual life insurance companies such as respondent. All such companies—foreign and domestic—pay only premiums taxes and

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[8] Prior to 1921, life insurance companies were taxed generally like all other corporations. From 1921 until 1958, they were taxed on their "net investment income" which was determined by a series of different formulae, pursuant to the various Revenue Acts between 1921 and 1939, the 1939 Code, the 1954 Code, and the Life Insurance Company Tax Acts of 1955 and 1956. Since 1958, in accordance with the provisions of the Life Insurance Company Income Tax Act of 1959, they have been subject to a complex three-phase tax formula involving underwriting and investment income and, in the case of stock life companies, distributions to shareholders.

[9] See Occidental Life Ins. Co. v. United States, 250 F. Supp. 130, 133 (S.D. Cal. 1965).

no income taxes.[10] It is thus entirely illogical to suggest that a premiums tax paid by a mutual life insurance company cannot have been paid in lieu of an income tax merely because some other type of insurance company may have been subject to both.

There is no inequity in the circumstance that some "American businesses" in Canada pay both excise and income taxes and are permitted a credit only for the latter. (Petition, p. 9).[11] The relationship between various types of foreign taxes cannot be established by generalizations or labels.[12] In each case the inquiry must be directed to the taxpaying situation of "the taxpayer claiming the credit," as the Regulations com-

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[10] Canadian stock life companies likewise pay no income tax on their insurance business; in the Dominion they do pay tax on amounts credited to shareholders. (Findings 51 and 52).

[11] The assertion that the purpose of the "in lieu of" provision was to equalize the foreign tax burdens of non-competing American businessmen is wholly novel. (Petition, p. 9). As the court below recognized (Petition, p. 25), the foreign tax credit provisions were expressly enacted to relieve a United States taxpayer from the necessity of paying a full United States tax as well as a foreign tax on its foreign business. Burnet v. Chicago Portrait Co., 285 U.S. 1. The decision below involves no "large loophole" (Petition, p. 6) unless petitioner means that a loophole is created every time the Government loses a tax contention that involves a significant amount of money.

[12] Although it is questionable whether, in the case of a life insurance company, the petitioner's characterization of a premiums tax as an "excise" tax is correct, a determination as to whether a particular tax is an "excise" tax is of no relevance in resolving the present issue. The Internal Revenue Service has ruled that a mining excise tax in Quebec was in lieu of the Quebec income tax (I.T. 4049, 1951-1 Cum. Bull. 32) and that Cuban premiums taxes were in lieu of Cuban income taxes (Rev. Rul. 55-504, 1955-2 Cum. Bull. 578).

mand. Whether excise taxes paid by American utility, mining, or automotive companies in Canada serve a different function in the tax structure of Canada than premiums taxes paid by mutual life insurance companies is quite immaterial. The court below did not purport to determine the relationship between such taxes and income taxes for all companies doing business in Canada.

CONCLUSION

The decision of the court below, which resolves particularized factual contentions in a manner entirely consistent with the governing statute and Regulations, is in conflict with no other decision and presents no special or important reason warranting review. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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April 4, 1967.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1144

UNITED STATES, PETITIONER

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The Court of Claims, in *Metropolitan Life Insurance Co.* v. *United States,* decided April 14, 1967 (App., *infra,* pp. 3–13), has again ruled that Canadian premiums taxes may be credited against federal tax liability, and its opinion clearly confirms that a substantial issue concerning the scope of the foreign tax credit is indeed presented in the instant case and in the companion case, No. 1203, this Term, *Prudential.*

It held that an American company exempt from the ordinary foreign income tax "for whatever reason"—"for administrative convenience or for reasons of policy or of legal theory"—may credit a non-income tax without showing a "functional connection" or other relationship between the two taxes (App., *infra,* pp. 5–6), and further concluded that a full credit will be allowed even though the claimed

"in lieu" tax is *not* "in lieu of the income tax solely or exclusively" (App., *infra*, pp. 12–13). Thus, what we view as the basic requirement for qualifying under the "in lieu" provision—that the tax to be credited was specifically fashioned to take the place of the general income tax (Pet. 6–8)—has been unequivocally rejected.[1] Moreover, the Court of Claims' exclusive reliance on exemption from part or all of the income tax as justifying the "in lieu" credit is underscored by its suggestion that American insurance companies, other than life insurers, may be entitled to credit the Canadian premiums taxes if it is found that they are subject to a "diminished income tax" and not the "normal income tax" (App., *infra*, p. 10).[2]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

APRIL 1967.

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[1] As a result of its interpretation of the "in lieu" provision, the Court of Claims found it unnecessary to reach or consider the factors on which the government relies (Pet. 8–10) to demonstrate the absence of any relationship between life insurers' exemption from Canadian income taxes and payment of premiums taxes (App., *infra*, pp. 5–6, n. 5, 8–9, 12–13).

[2] *Metropolitan* extended the credit to Ontario premiums taxes paid in 1957, without discussion of a major change in taxing insurance companies that the Province adopted in that year (see App., *infra*, p. 9, n. 11, 12–13; and Pet. 5, n. 4, 60). In addition, the decision allowed the credit as to premiums taxes imposed by four other provinces which imposed no income taxes whatever, on the ground that they were in lieu of the *Dominion's* income tax (App., *infra*, p. 12). The Court of Claims also stated its agreement with *Occidental Life Insurance Co.* v. *United States*, 250 F. Supp. 130 (S.D. Calif.), appeal pending (C.A. 9, No. 21039), thus indicating that it will hold that the credit is available to stock as well as mutual life insurance companies.

APPENDIX

In the United States Court of Claims

Nos. 79–59, 444–60, 361–64

(Decided April 14, 1967)

METROPOLITAN LIFE INSURANCE COMPANY
v.
THE UNITED STATES

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

ON PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTIONS FOR SUMMARY JUDGMENT

DAVIS, *Judge*, delivered the opinion of the court:

This is the fourth time in as many years that we are called upon to consider the application of the foreign tax credit (Sec. 131 of the Internal Revenue Code of 1939; Sections 901, 903 of the Internal Revenue Code of 1954) to the Canadian premiums taxes on mutual life insurance companies. See *Prudential Ins. Co.* v. *United States*, 162 Ct. Cl. 55, 319 F. 2d 161 (1963); *Prudential Ins. Co.* v. *United States*, 167 Ct. Cl. 598, 337 F. 2d 651 (1964), pending on petition for a writ of certiorari, U.S. Sup. Ct., No. 1203, Oct. Term 1966 (filed March 30, 1967); *Equitable Life Assurance Society* v. *United States*, 177 Ct. Cl. ——, 366 F. 2d 967 (Oct. 1966), pending on petition for a writ of certiorari, No. 1144, Oct. Term, 1966 (filed March 13, 1967). In that series of decisions we held that various of these premiums taxes imposed by the Dominion, Ontario, and Quebec for 1949 through 1956 were paid "in lieu of a tax upon in-

come" and were therefore available for the foreign tax credit. Here, the Metropolitan Life Insurance Company claims (in three companion cases) the same treatment for premiums taxes paid variously for 1946 and 1949–1957 to the Dominion, Ontario, Quebec, Manitoba, Newfoundland, Nova Scotia, and Prince Edward Island.[1] The parties have agreed that the relevant statutes of the Dominion, Quebec, and Ontario are the same for the years 1949–1956 as in the earlier cases; without serious dispute we find this also to be true of 1946 and 1957.[2] For the fourth time we uphold the taxpayer. In this opinion we do not retrace our steps; the Government's successive arguments in the prior cases have already been answered and need not be discussed again insofar as they are repeated *pro forma*. We limit ourselves to the contentions pressed in the current round.

One of the points the Government urges strongly is that Congress intended the "in lieu" part of the foreign tax credit to apply only to so-called "empirical" income taxes—those clearly seeking to levy solely on net income but using a simplified or convenient formula or method for calculating such profit in order to avoid the administrative difficulties of ascertaining a nonresident's net income within the country. The legislative history of the 1942 amendment adding the "in lieu" provision is said to demonstrate that the Congressional purpose was to extend the credit only that far and no further. See the Senate report quoted in *Prudential I*, *supra*, 162 Ct. Cl. at 58–59, 319 F. 2d at 162–63; Statement of Mitchell B. Carroll, representing the National Foreign Trade Council, *Hearings before the Senate Committee on Finance on the Revenue Act of 1942*, 77th Cong., 2d Sess. 206, 207–08, 210–12, 214–17.[3]

We do not interpret this history as confining the "in lieu" amendment to specific foreign taxes which can be characterized as "empirical" or administrative or "short-cut" attempts to reach the same figure as the normal foreign income

[1] Together, the three cases cover premiums taxes paid to the Dominion in 1946 and 1949 through 1957; to Quebec in 1949 through 1957; to Ontario in 1949 through 1952 and 1957; and to the other provinces in 1957.

[2] The case of the other provinces for 1957 is discussed *infra*.

[3] Mr. Carroll proposed an extension of the foreign tax credit beyond the "income, war profits and excess profits taxes" which the statute then covered. Defendant relies on his statements referring, *e.g.*, to an "empirical tax" specifically levied as "a short-cut method to facilitate the determination of liability to the tax on net income."

tax would bring if it could more easily be calculated. These were, it is true, the main examples given by the spokesman for the National Foreign Trade Council (Mr. Carroll), but he also referred to a Guatemala statute exempting from the general income tax companies which had their taxes fixed by *contract or law* (citing the agreement of an American company to have its exported agricultural commodities taxed at 1½ cents per unit), and he observed, generally, that "the income-tax laws or decrees of various Latin-American countries provide for taxation on an *arbitrary* basis in lieu of the tax on net income" (emphasis added).[4] Above all, he emphasized the overriding aim of the foreign tax credit to forestall double-taxation of the earnings of the American company on foreign soil—first by the other country and then by the United States. See *American Chicle Co.* v. *United States*, 316 U.S. 450, 452 (1942).

In recommending the extension of the credit, the Senate committee report (S. Rep. No. 1631, 77th Cong., 2d Sess. 131–32 (1942–2 Cum. Bull. 602)) refers to substitute taxes (measured by gross sales, gross income, or number of cents produced) "growing out of the administrative difficulties of determining net income on taxable basis" within the foreign country, but it does this only by way of example (the report commences this reference by "Thus") showing that our then internal revenue law recognized only foreign taxes imposed "upon a basis corresponding approximately to net income" under the American concept of that term. Without indicating that this illustration of non-income taxes levied because of "administrative difficulties" was the only one it wished to cover, the committee simply said that it "deemed it desirable to extend the scope of this section" (the foreign tax credit) and recommended the broad language of the "in lieu" provision as we now have it.

These capsule observations do not persuade us that Congress excluded "in lieu" taxes imposed by a foreign country, not because of administrative or computation or "empirical" difficulties, but because it was considered bad policy or inconsistent with the country's legal theory to levy the normal

[4] The Senate hearing took place in 1942, in the midst of World War II when practically the only foreign trade of this country was with Latin America.

income tax upon a particular class of company.[5] In the "in lieu" modification, Congress continued and expanded its prime purpose of preventing double taxation of the American company's foreign income.[6] This was now to be done by allowing the credit for any alien tax imposed instead of an income tax (if the latter was generally levied) for whatever reason the other country might consider it proper to substitute the "in lieu" levy in the special case for the ordinary income tax generally imposed. *Cf.* Owen, The Foreign Tax Credit 77 (1961). In that way there would be no discrimination against the American company abroad which is exempted from the ordinary foreign income tax—for administrative convenience or for reasons of policy or of legal theory—but is instead required to pay another type of tax in order to contribute to the other country's revenues.[7] There need be no functional connection between the foreign income tax and the "in lieu" tax; no coordination of rates; no effort to approximate the amount of the general income tax or to reach the same subject matter or to replace the normal formula for computing income by a special formula designed to achieve the same or roughly the same amount. If that had been the perimeter of the Congressional objective, it would only have been necessary to declare that "income, net profits and excess profits taxes" shall include taxes which "in effect" or "approximately" or "in substance" reach income and profits—rather than to provide, as Congress did, coverage of *all* taxes paid "in lieu" of income taxes otherwise generally imposed. Congress seems to us to have recognized that taxing jurisdictions, exempting a type of business from the ordinary income tax, often substitute a wholly separate

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[5] As indicated in our prior decisions, especially *Equitable*, this is how we view the Canadian premium taxes on mutual life insurance companies.

[6] It is not uncommon for Congress to bar double taxation by means of a credit rather than a simple deduction of the other tax. The District of Columbia Income Tax Act, for instance, allows a credit for income taxes or intangible personal property taxes paid by District residents to their own states.

[7] Defendant makes something of the earlier rejection, by the House Committee on Ways and Means, of the National Foreign Trade Council's more-inclusive proposal for a credit for *any* foreign taxes measured "by income or receipts, including statutory income." (Hearings on the Revenue Revision of 1942, House Ways and Means Committee, 77th Cong., 2d Sess. 578–79). But this initial suggestion far out-ran the proposal in the Senate or the final "in lieu" amendment. It was not restricted to such taxes imposed "in lieu" of or in substitution for the ordinary income tax but would have included all gross receipts or sales taxes; nor did it require that the foreign nation have an income tax "otherwise generally imposed."

tax grounded in another theory and yielding a different amount.[8] The credit against our income tax is to be kept within reasonable bounds, and tied to the fundamental purpose of preventing double taxation, by the continuance of the limitation (see 1954 Code § 904) allowing the credit "only if and to the extent the taxpayer has net income from sources within the foreign country or from sources without the United States, as the case may be." S. Rep. No. 1631, *supra*, p. 132. See *Equitable*, slip op. p. 13, 366 F. 2d at 974.

The sovereign inquiry, then, is "whether the tax was levied by the foreign country in place of or instead of or as a substitute for some existing income or profits tax." *United States* v. *Waterman S.S.*, 330 F. 2d 128, 131 (C. A. 5, 1964), reviewed on another point, 381 U.S. 252 (1965). See, also, *Compania Embotelladora Coca-Cola, S.A.* v. *United States*, 134 Ct. Cl. 723, 727–28, 139 F. Supp. 953, 955 (1956). If the Canadian jurisdictions with which we are now concerned had all said explicitly that for mutual life insurance companies the premiums tax was in lieu of the general income tax, as some jurisdictions have,[9] there would be no question, we feel sure, that the foreign tax credit would be allowable here.[10] In our prior decisions we have held that, without saying so explicitly in the legislation, this is what the Dominion and the provinces have done, in actual effect, with respect to mutual life insurance companies.

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[8] In other parts of the very Revenue Act which adopts the "in lieu" amendment to the foreign tax credit, Congress expressly used the "in lieu" locution to refer to taxes which would clearly impose very different amounts upon the taxpayer. See, *e.g.*, Sections 485 and 222 of the Revenue Act of 1942, 56 Stat. 798, 895, 914.

[9] The British Columbia legislation states expressly that the premiums tax is in lieu of both the income and the personal property taxes otherwise imposed by that province. See finding 29 in *Equitable*, 177 Ct. Cl. at ——. In Newfoundland, in the event the province again imposed income taxes itself, the 1957 premiums tax was declared to be "deemed to be in lieu of all other taxes imposed under The Income Tax Act", as was the earlier premiums tax (*Equitable*, finding 46(5)). In Ontario, the legislature indicated, in 1937, that insurance companies were "specially taxed" by the premiums tax "and are therefore exempt from the tax, calculated on net income imposed herein." *Equitable, supra*, 177 Ct. Cl. at ——, 366 F. 2d at 972. In the United States, the District of Columbia Code specifically provides that the premiums tax shall be in lieu of income and most other taxes.

[10] Congress is not unfamiliar with a specific statement that one tax is "in lieu" of another. The Internal Revenue statutes have declared in express terms that certain federal taxes are "in lieu" of others. See Sections 211, 231 of the 1939 Code and Sections 871, 881 of the 1954 Code (up to 1966), and see the District of Columbia example cited in the preceding footnote. See also footnote 8, *supra*.

We have found "a very close connection between the imposition of the Canadian premiums taxes involved here and the failure to impose income taxes." *Prudential II*, 167 Ct. Cl. at 604, 337 F. 2d at 654. The Canadian jurisdictions, we also found, made "a cognizant and deliberate choice * * * between the application of premiums taxes or income taxes for mutual life insurance companies. This choice was first made by the Canadian provinces at various times generally in the 1930's, as they recognized the income tax as an increasingly effective and necessary method of raising revenue." They made a "deliberate selection between a special method of raising revenue [the premiums tax] and a general method [the normal income tax] * * * *. In other words, both the Dominion and the provinces decided to impose or retain the premiums taxes because these insurance companies were not being asked to pay income taxes [for policy reasons], and it was thought that adequate taxes should be paid by these companies as well as by the other businesses which were subject to the income tax. * * * In neither the United States nor Canada has there been a general tax on income of mutual life insurance companies as was generally applied to other corporations. Canada chose a premiums tax rather than the special formula income tax chosen by the United States to apply to life insurance companies." *Equitable*, slip op., pp. 8, 12, 366 F. 2d at 972, 974. We concluded that "this difference in tax methods or formulae between the tax jurisdictions gave rise to precisely the situation envisioned in the enactment of the ['in lieu' provision]" and that in these circumstances the Canadian jurisdictions' choice to impose or retain the premiums tax was enough to characterize that tax as imposed "in lieu" of income taxes. *Id.* at 974.

That conclusion, the Government now urges, must be wrong, at least as to the Dominion levy, because it fails to take into account the signal fact that several types of insurance companies, other than mutual life, have been subjected by the Dominion, in some periods, to the premiums taxes and the income tax. Both the 2% premiums tax and the regular income tax (in whole or in part) have been imposed by the Dominion simultaneously on mutual and stock fire and casualty companies, on resident stock life companies, and on nonresident stock life companies. See *Equitable*,

finding 71.[11] It is said that, for a foreign tax to be "in lieu" of an income tax, *all* persons subject to the "in lieu" tax must be exempt from the income tax; otherwise, the argument runs, it will be impossible to call the special impost a substitute for the income tax, and moreover grave anomalies will emerge. If the premiums tax is deemed an "in lieu" levy for mutual life companies, the defendant insists that the dilemma is necessarily presented of either "discriminating" between casualty and life insurance by refusing to allow the premiums tax as a credit for the former (leading to the "ironic result" that the casualty company which pays both taxes receives no credit for the premiums tax, while the life company which is subjected only to the premiums tax is allowed the credit), or of permitting the premiums tax as a credit in both instances (and thus, in the casualty case, contravening the foreign tax credit statute which "has consistently been interpreted as requiring that a qualifying tax be imposed in lieu of and not in addition to the income tax").

We need not, and do not, forecast the result when companies other than mutual life claim a credit for the premiums tax. Such cases are not before us and we do not know the particular arguments and distinctions which can be made. But whatever way those questions may be resolved, we can properly hold, as we have, that for the mutual life insurance business the Canadian premiums tax is "in lieu" of the income tax. There will be no dilemma or discrimination however the other companies are treated. If the premiums tax is disallowed, it will be because the court concludes that—for those firms, in contrast to mutual life companies—the particular pattern of the Canadian legislation shows that this tax is not "in lieu" of "a tax upon income * * * otherwise generally imposed * * *", but is simply an additional levy. In that event it will not be anomalous to exclude the premiums tax from the foreign tax credit; presumably the Canadian income tax (which such a company pays) will supply the credit which mutual life taxpayers must obtain through

[11] Only stock fire and casualty companies paid the full Dominion income tax as well as the premiums tax. The other companies paid regular Dominion income taxes only on various selected items. In the years prior to 1957, all the insurance companies liable to the Quebec and Ontario premiums taxes were exempted from the provincial income tax. Beginning in 1957, those two provinces followed the Dominion practice (see *Equitable*, finding 69), but only Ontario's taxes for 1957 are involved in the present cases.

the premiums tax if at all. If the Canadian statutes point to this difference in treatment, it would not be bizzare to say that in the one context the premiums tax is "in lieu" of the income tax while in the other it is not. The classic name of *Towne* v. *Eisner*, 245 U.S. 418, 425 (1918), is authority enough that in our law the same designation does not always mean the same thing.

On the other hand, if the premiums tax is allowed for these non-mutual companies it may be because the diminished income tax levied (in most instances) is not "otherwise generally imposed" and the premiums tax is "in lieu" of the normal income tax (*cf. Compania Embotellador Coca-Cola, S.A.* v. *United States*, 134 Ct. Cl. 723, 139 F. Supp. 953 (1956)), or for some other reason implicit in the Canadian scheme for taxing those companies.[12]

As in this country, there has always been a wide disparity in the ways the various Canadian jurisdictions have taxed different kinds of insurance companies, and those taxes have had their own histories, backgrounds, and patterns on which the result of a foreign credit claim may well depend. In this and the three previous opinions we have been concerned only with mutual life insurance companies and their special treatment by the Dominion and the provinces. We can decide these claims without passing upon, or suggesting the ruling for, the claims of other kinds of taxpayers.

Another of defendant's present points is that the Dominion intended Part III of the Income Tax Act (under which plaintiff was taxed beginning in 1953)—not the premiums tax—to be "in lieu" of the regular income tax (Part I of the Income Tax Act). Part III levied a limited income tax on non-residents. For foreign life insurance companies, it placed a flat 15 per cent tax on investment income from Canadian investments exceeding 110% of the reserves they were required to maintain in Canada. See *Equitable*, slip op., p. 7 n. 1, and findings 55 and 61.[13] This amounted in Metropolitan's case to $4,137.25 in 1956 and $6,393.21 in 1957

[12] We emphasize that we have been determining only the rights of mutual life insurance companies, and that the claims of other types of taxpayers are not at all before us. Our statements about the possible basis for deciding their claims are not intended to intimate any opinion on their merits, one way or the other, but solely to indicate that, however such cases may turn out, the position of the mutual life company will be unaffected.

[13] These reserves were to be at least equal in value to the Canadian liabilities.

(the only payments under Part III in the years now involved). Comparing this minor levy to the United States income tax on nonresidents not doing business here (up to 1966) (Section 211 and 231 of the 1939 Code and Sections 871 and 881 of the 1954 Code), as well as to our income tax on life insurance companies (Section 201(c) of the 1939 Code and Section 803 of the 1954 Code), defendant submits that the Part III tax, not the premiums tax, represents Canada's chosen substitute for the regular income tax imposed by Part I.

We differ from the Government in our understanding of the Canadian legislation in its historical setting. Part III was concerned with nonresidents generally, not with insurance companes. Domestic Canadian mutual life companies were not subject to Part III and paid only the premiums tax. Foreign mutual life firms, like plaintiff, were free of the Part III tax so long as their funds invested in Canada did not exceed the amounts normally derived from and held for the protection of their Canadian life business (see footnote 13, *supra*). Only when extra funds were invested in Canada did Part III become applicable to the income derived from that excess. This is a very secondary tax, designed to reach a special kind of income, which by no means took the place of the regular Part I tax. It was no more than a small additional income tax. *Cf. Compania Embotelladora Coca Cola, S.A.* v. *United States*, *supra*, 134 Ct. Cl. at 727, 139 F. Supp. at 955.

A related contention is that, for the purposes of the foreign credit, the Part III tax must be considered an "income tax * * * generally imposed" upon taxpayers and others, and therefore that the "in lieu" provision cannot apply at all since an income tax itself was levied by Canada on this plaintiff. The answer is implicit in what we have already said. At least for mutual life insurance companies, Part III was not an "income tax * * * generally imposed" by the Dominion. For one thing, it was a non-resident's tax; domestic insurance companies did not pay it. In that respect Part III was not comparable to this country's provisions for taxing net investment income of mutual life companies doing business here—a tax which covers domestic firms. Even as a non-resident tax, Part III reached only a limited type of excess investment income in Canada—unlike the

American tax on the income of nonresidents (not engaged here in trade or business). It would distort the application and aims of the "in lieu" portion of the foreign tax credit to characterize this minor and specialized additional tax as an "income tax * * * generally imposed" by Canada.

With respect to the 1957 premiums tax levied by Manitoba, Newfoundland, Nova Scotia, and Prince Edward Island, defendant contends that that tax could not have been "in lieu" of an income tax since those provinces did not have any income tax in that year. For 1957 through 1961, they continued to rent their income taxes to the Dominion, and the imposition of the prior provincial income tax was expressly suspended in each instance by the rental agreements and implementing legislation.[14] These prior income tax statutes (*i.e.*, pre-1941) excepted mutual life insurance companies (see *Equitable*, findings 46 (3), (5), (6), and (8)), and by 1957 the four provinces had all amended their suspended income tax statutes to continue the specific exemption for life companies paying the premiums tax. These circumstances show, in our view, that the "income taxes * * * otherwise generally imposed" in 1957 were the Dominion's income taxes and the tax "in lieu" of that income tax was the premiums tax of the province. The intimate interrelationship and coordination of the Dominion and the provincial taxes warrant this reading. Metropolitan's tax burden was the same as if both the income tax and the premiums tax had been levied by one jurisdiction, instead of by two working together. The purpose of the foreign tax credit to avoid double taxation is furthered by treating the Dominion income tax and the provincial premiums tax as closely and reciprocally related, just as Canada has done.

The last of the arguments defendant emphasizes in this case is that the Quebec and Ontario premiums taxes were "in lieu" not only of the provincial income tax but also of the provincial tax on capital and places of business. See *Occidental Life Ins. Co.* v. *United States*, 250 F. Supp. 130, 133 (S.D. Cal. 1965), now on appeal to the Ninth Circuit (No. 21039). We need not decide whether defendant is correct in its interpretation of the Quebec and Ontario taxing schemes because we agree with *Occidental* that the "in lieu"

[14] The four provinces had rented their income taxes to the Dominion since 1942.

provision does not require the premiums tax to be in lieu of the income tax solely or exclusively. At the least, the premiums tax stood very largely and substantially in the shoes of the income tax; the reciprocal relationship was not merely incidental, tangential, or minor. In precise terms the one was "in lieu" of the other. Neither the text of the foreign tax credit sections, their purpose, or their history persuade us that Congress intended to disallow entirely an "in lieu" tax which does take the place of an income tax simply because it may also be used by the foreign country as a substitute for another, noncreditable, tax. Perhaps that would be the result if we were required to give the "in lieu" aspect of the credit a Procrustean fit, but we do not see the Congressional objective as so iron and rigid. Congress did not wish to discourage foreign trade by American companies but to advance, if not to attain completely, more equal treatment in our tax law of American firms engaged in business abroad.[15]

For these reasons, and on the basis of *Prudential I*, *Prudential II*, and *Equitable*, we hold that plaintiff is entitled to recover and judgment is entered to that effect. Plaintiff's motions for summary judgment are granted and defendant's cross-motions are denied. The amount of recovery will be determined under Rule 47(c).

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[15] Defendant does not again emphasize its past argument that there was no double taxation of income here because, in its view, the premiums taxes were imposed on or with respect to receipts not taxed in the United States. The point was answered in *Equitable*, 177 Ct. Cl. at ——, 366 F. 2d at 974. See also, *Dexter* v. *Commissioner*, 47 B.T.A 285 (1942), acq. 1948–2 Cum. Bull. 1; *Helvering* v. *Campbell*, 139 F. 2d 865, 870–71 (C.A. 4, 1944); *Marsman* v. *Commissioner*, 205 F. 2d 335, 343 (C.A. 4, 1953); *Brace* v. *Commissioner*, 11 CCH Tax Ct. Mem. 906, 907 (1952); Rev. Rul. 54–15, 1954–1 Cum. Bull. 129; Rev. Rul. 55–505, 1955–2 Cum. Bull. 578; Rev. Rul. 55–504, 1955–2 Cum. Bull. 578. *Hubbard* v. *United States*, 84 Ct. Cl. 205, 17 F. Supp. 93 (1936), *cert. denied*, 300 U.S. 666 (1937), is inapplicable.

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